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NEGLIGENCE  
OF  
IMPOSED DUTIES,  
CARRIERS OF FREIGHT.

BY

CHARLES A. RAY, LL. D.

(EX-CHIEF JUSTICE OF INDIANA SUPREME COURT. AUTHOR OF NEGLIGENCE OF  
IMPOSED DUTIES, PERSONAL, AND CARRIERS OF PASSENGERS,  
AND CONTRACTUAL LIMITATIONS.)

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NEGLIGENCE  
OF  
IMPOSED DUTIES,  
CARRIERS OF GOODS.

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CHAPTER I.

LIABILITY AND DUTY TO PROVIDE SAFE TRANSPORTATION.

- § 1. *Who Are Common Carriers.*
  - a. *Express Companies Liable as Common Carriers.*
- § 2. *Distinction in Liability Between Carriers of Goods and Passenger Carriers.*
- § 3. *Carriers by Rail Must Furnish Suitable Cars.*
- § 4. *Cars Must be Adapted to their Intended use.*
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- § 7. *Carrier by Water Must Answer for Competency of Officers and Crew.*
- § 8. *Duty of Carrier of Goods to Inspect Present Condition of Implements of Transportation.*
- § 9. *Discrimination Between Express Companies in Furnishing Facilities.*

§ 1. *Who are Common Carriers.*

The employment of a common carrier is a public one, charging him with the duty of accommodating the public in the line of his employment. He is such by virtue of his occupation, not by virtue of the responsibilities under which he rests. Even if the extent of those responsibilities is restricted by law or by contract, the nature of his occupation makes him a common carrier still. A common carrier may become a private carrier or a bailee for hire when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to

carry. For the carrier is only subject to the responsibility of a common carrier as to such goods as he is in the habit of transporting in that employment, and such other goods as he accepts without any limit of responsibility,<sup>1</sup> and over the route and by the method he usually employs.<sup>2</sup>

Whether a steamboat will be held liable as a common carrier for money delivered to the clerk to be paid over at another landing is still a question on which courts will differ.<sup>3</sup> As will appear by an examination of the cases above cited, unless it can be shown that some compensation is paid at some fixed rate and the transfer is not undertaken in the mere hope of patronage induced by the accommodation, the liability will not be established.<sup>4</sup> But a liability will be established where it is shown that, from usage and practice, this has grown to be part of the business.<sup>5</sup> And when a carrier has a regularly established business for carrying all of certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not, in many jurisdictions, divest it of that character. The fundamental principle upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence.<sup>6</sup>

All who undertake to carry goods indifferently for hire, are common carriers. A person who makes it a business to solicit

<sup>1</sup> *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334.

<sup>2</sup> *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Pitlock v. Wells, Fargo & Co.* 109 Mass. 452.

<sup>3</sup> *Sewall v. Allen*, 6 Wend. 346; *Lee v. Burgess*, 9 Bush, 652; *Citizens Bank v. Nantucket S. B. Co.* 2 Story, 33; *Cincinnati & L. M. L. Co. v. Boal*, 15 Ind. 345; *Whitmore v. The Caroline*, 20 Mo. 513.

<sup>4</sup> *Chouteau v. The St. Anthony*, 16 Mo. 216, 20 Mo. 519.

<sup>5</sup> *Hosea v. McCrory*, 12 Ala. 349; *Kirtland v. Montgomery*, 1 Swan, 452.

<sup>6</sup> *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89.



carriage of trunks and packages from place to place for hire is a common carrier.<sup>1</sup> Such persons were chargeable, in the general custom of the realm, for their faults or miscarriage,<sup>2</sup> but a private person who carries for hire, although as an occupation, but selecting his customers, is not responsible as a common carrier.<sup>3</sup>

The regularity of the trips or the fixed points between which the carriage is done, is not an absolute essential in determining whether the carrier be a private or common carrier,<sup>4</sup> and one who is only a carrier in a particular case and does not exercise the business of a common carrier, is only answerable for ordinary negligence, unless he assumes a greater liability by express contract.<sup>5</sup> The cases of *Gordon v. Hutchinson*, 1 Watts & S. 285, 37 Am. Dec. 464, and *Moss v. Bettis*, 4 Heisk. 661, 14 Am. Rep. 1, have not extended the law of common carriers so as to include occasional volunteers who carry under special contract, as in *Powers v. Davenport*, 7 Blackf. 497, 43 Am. Dec. 100. The cases are evidently founded on false premises and are not recognized as changing the rule.<sup>6</sup>

But truckmen, teamsters, cartmen, porters and the like, who undertake to carry goods for hire, as an employment, from one town to another or from one part of a town or city to another, are common carriers.<sup>7</sup> A railroad company is a common carrier and subject to judicial control.<sup>8</sup>

Owners and masters of ships are common carriers by water, whether they are regular packet ships or carrying smacks or

<sup>1</sup> *Robinson v. Cornish*, 34 N. Y. S. R. 695; *Gisbourn v. Hurst*, 1 Salk. 249; *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133.

<sup>2</sup> *Upshure v. Adee*, 1 Comyns, 25; Bull, N. P. 70.

<sup>3</sup> *Robinson v. Dunmore*, 2 Bos. & P. 416; *Satterlee v. Groat*, 1 Wend. 272.

<sup>4</sup> *Penneicill v. Cullen*, 5 Harr. (Del.) 238; *Liver Alkali Co. v. Johnson*, L. R. 7 Exch. 267, L. R. 9 Exch. 338.

<sup>5</sup> *Robinson v. Dunmore*, 2 Bos. & P. 416.

<sup>6</sup> *Samms v. Stewart*, 20 Ohio, 69, 55 Am. Dec. 445; *Steele v. McTyer*, 31 Ala. 667, 70 Am. Dec. 516; *Fish v. Clark*, 49 N. Y. 122; *Allen v. Suckrider*, 37 N. Y. 341; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Flautt v. Lashley*, 36 La. Ann. 106.

<sup>7</sup> *Gisbourn v. Hurst*, 1 Salk. 249.

<sup>8</sup> *Seofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846; *Winnona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Atlantic & P. R. Co. v. Laird*, 58 Fed. Rep. 760.

coasting ships or other ships taking on general freight.<sup>1</sup> Whether towboats are common carriers, in as much as they do not take possession of their tow as the carrier does of his goods, has been answered in the affirmative in Louisiana, North Carolina and California; depending, however, upon the fact that the voyage was a long one and the vessels in tow placed completely under control of the towing vessel.<sup>2</sup> Elsewhere this liability is denied.<sup>3</sup>

A corporation which, being under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for the engines, cars and trains of the railway company, the first section of the "Act to Regulate Commerce," regards the railway company as the owner, or operator of the bridge and approaches, for the time being, as to all freight transported by the railway company over the bridge. And as to all such traffic, the railway company, and not the bridge company, must be regarded as the common carrier. Such a bridge company is not, either in law or in fact, a common carrier of interstate traffic, within the scope and mean-

<sup>1</sup> *LaTourette v. Burton* ("The Commander-in-Chief"), 68 U. S. 1 Wall. 43, 17 L. ed. 609; *Schieffelin v. Harvey*, 6 Johns. 170; *Elliott v. Rossell*, 10 Johns. 1; *Hutton v. Osborne*, 1 Selw. N. P. 407; *Hastings v. Pepper*, 11 Pick. 41; *Jencks v. Coleman*, 2 Sumn. 221; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745.

<sup>2</sup> *Clapp v. Stanton*, 20 La. Ann. 495, 96 Am. Dec. 417; *Bussey v. Mississippi Valley Transp. Co.* 24 La. Ann. 165, 13 Am. Rep. 120; *Walston v. Myers*, 50 N. C. 174; *White v. The Mary Ann*, 6 Cal. 462, 65 Am. Dec. 523; *Ashmore v. Pennsylvania Steam Towing Transp. Co.* 28 N. J. L. 180.

<sup>3</sup> *Arctic F. Ins. Co. v. Austin*, 54 Barb. 559; *Alexander v. Greene*, 3 Hill, 9, 7 Hill, 553; *Hays v. Miller*, 77 Pa. 238, 18 Am. Rep. 445; *Eastern Transp. Line v. Hope*, 95 U. S. 297, 24 L. ed. 477; *The Margaret v. Bliss*, 94 U. S. 494, 24 L. ed. 146; *The Julia*, 14 Moore, P. C. 210; *Pennsylvania, D. & M. S. Nav. Co. v. Dunbridge*, 8 Gill. & J. 248, 29 Am. Dec. 543; *Varble v. Bigley*, 14 Bush, 698, 29 Am. Rep. 435; *Symonds v. Pain*, 6 Hurls. & N. 709.

ing of said section; and it cannot invoke the provisions of said Act, to compel railway companies to transact business with, or through such bridge company. Between such a bridge company, and the railway carriers of the country, the Act establishes no such reciprocal relations, duties, and obligations, as require the latter to form business connections with the former.<sup>1</sup>

The common carriers named and referred to in the last clause of section 3 of the Act to Regulate Commerce are such alone as are subject to the provisions of that statute. Companies engaged in simply furnishing a roadway as bridge companies, turnpike and canal corporations, are not common carriers.<sup>2</sup>

Where the cars are hired by the shipper, and motive power and use of the road is provided by the carrier railroad the question has arisen as to the liability assumed by the latter. In the Supreme Court of the United States and the supreme court of New York, the liability of a carrier has been imposed.<sup>3</sup> But, in two or three of the states this liability has been denied.<sup>4</sup> And the same denial of liability was made where the consignor is the owner of the cars transported.<sup>5</sup>

It may be said as a general proposition that if the duties imposed by statute are of the nature of a carrier of passengers, in the absence of any express limit of liability, it would be reasonable to assume that the intention was, in imposing a duty, that the one who undertook it should assume the ordinary liability of the carrier.<sup>6</sup>

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567.

<sup>2</sup> *Grigsby v. Chappell*, 5 Rich. L. 443; *Lake Superior & M. R. Co. v. United States*, 93 U. S. 444, 23 L. ed. 967; *Exchange F. Ins. Co. v. Delaware & H. Canal Co.* 10 Bosw. 180.

<sup>3</sup> *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Malloy v. Tioga R. Co.* 39 Barb. 488.

<sup>4</sup> *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567; *East Tennessee & G. R. Co. v. Whittle*, 27 Ga. 535, 73 Am. Dec. 741; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291.

<sup>5</sup> *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374.

<sup>6</sup> *Gibbs v. Liverpool Docks Trustees*, 3 Hurlst. & N. 164; *Mersey Docks & H. Board v. Gibbs*, L. R. 1 H. L. 93, 35 L. J. Exch. 225; *Lancaster Canal Co. v. Parnaby*, 11 Ad. & El. 223; *Mersey Docks & H. Board v. Penhallow*, 7 Hurlst. & N. 329, 30 L. J. Exch. 329.

a. *Express Companies Liable as Common Carriers.*

Although express companies avail themselves of the transportation facilities afforded by other carriers, this in no sense releases them from liability; but renders them, in fact, responsible for the agents which they employ. A railroad company carrying packages for an express company is the agent of the latter, and the express company cannot stipulate for exemption from liability for the railroad company's negligence.<sup>1</sup>

A transportation company not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character.<sup>2</sup>

An express company is bound at its peril to deliver packages consigned to its care; and a failure to do so, not induced by any negligence of the consignor, will not excuse it, regardless of the fraud or imposition which induced a delivery to an impostor. It is liable for a package of money delivered to an impostor, although his telegram induced its shipment and the real consignee acted with him in conspiring to defraud.<sup>3</sup>

An arrangement between a dispatch company in St. Louis, Mo., and sundry railroad companies whose lines terminated at New York, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract at the established rate or at any special rate furnished by the railroad does not involve joint liability upon the part of railroad companies nor make them partners, either *inter esse* or as to third persons.<sup>4</sup>

An express company carrying money, goods and parcels for hire, from one locality to another, is a common carrier.<sup>5</sup> And,

<sup>1</sup> *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

<sup>2</sup> *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392.

<sup>3</sup> *Shearer v. Pacific Exp. Co.* 43 Ill. App. 641.

<sup>4</sup> *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679.

<sup>5</sup> *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

though they assume the name of dispatch companies, forwarders, fast freight lines,—the business in which they engage being, in fact, that of common carrier, they assume its responsibilities.<sup>1</sup>

In common law, the obligation of the carrier is not that he will, through his own agency, carry and deliver the goods entrusted to him. The real contract is, that the goods are to be carried to their destination, unless the fulfillment of this undertaking is prevented by the act of God, or the public enemy. This is the entire contract in fact,—whether the goods are to be carried by land or water,—by the carrier himself or by agencies employed by him. There is no personal trust employed in the sense that the contract can not as well be executed through an agent and by means of transportation employed by it;—and yet not actually under its personal control. And, it is still true that the particular mode or agency by which it is performed does not enter into the contract of the carriage with the owner or consignor.<sup>2</sup>

Certainly the fact that express companies undertake to secure greater care and more speedy delivery, and that they cause this delivery to be made to the consignee personally, is not to be held as waiving any duty already resting upon them as common carriers.<sup>3</sup>

<sup>1</sup> *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68.

<sup>2</sup> *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392; *Place v. Union Exp. Co.* 2 Hilt. 27; *Bank of Kentucky v. Adams Exp. Co.* and *Buckland v. Adams Exp. Co.* *supra*; *United States Exp. Co. v. Backman*, 23 Ohio St. 144.

<sup>3</sup> *Oderkirk v. Fargo*, 58 Hun. 347; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Read v. Spaulding*, 5 Bosw. 395; *Merchants Despatch Transp. Co. v. Joesting*, 89 Ill. 152; *Merchants Dispatch Transp. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757; *Bancroft v. Merchants Despatch Transp. Co.* 47 Iowa, 262, 29 Am. Rep. 482; *Wilde v. Merchants Despatch Transp. Co.* 47 Iowa, 247, 29 Am. Rep. 479; *Merchants Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Southern Exp. Co. v. McVeigh*, 20 Gratt. 264; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Stewart v. Merchants Despatch Transp. Co.* 47 Iowa, 229, 29 Am. Rep. 476; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Bennett v. Northern Pac. Exp. Co.* 12 Or. 49; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Mather v. American Exp. Co.* 138 Mass. 55, 52 Am. Rep. 258; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Southern Exp. Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Boscovitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191; *Bernstine v. Union Exp. Co.* 40 Ohio St. 451; *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Hadd v. United States & C. Exp. Co.* 52 Vt. 335, 36 Am. Rep. 757; *United States Exp. Co. v.*

In a suit against an express company for the value of a package of money received by it to be carried and delivered to the plaintiff, which it failed to do,—the answer was that the package was duly received at the office of the defendant at the town to which it was directed; that the defendant, upon inquiry, could not find the residence of the plaintiff to be in the said town or its vicinity, and, being ignorant of his real place of business or post-office address, the defendant, on the day of the arrival of said package, wrote a notice informing the plaintiff of its arrival at said office and that it was ready for delivery, and inclosed said notice in an envelope addressed to said plaintiff at said town and duly stamped, and dropped the same into the postoffice at said town, and placed said package in a safe owned by the defendant, wherein defendant kept all money packages arriving by express for parties, and safely locked the same, the package remaining thus securely locked up for several days, and no one calling for it until it had been stolen by burglars, who in the night-time violently broke into the office of defendant, where the safe was, and, without knowledge of the defendant, broke open said safe and feloniously stole, took, and carried away said package of money, without any fault or neglect of the defendant,—it was held, that the facts alleged in the answer were not sufficient to discharge the defendant from liability as a common carrier, and that if they could be so deemed, still, the answer failed to show that the defendant exercised reasonable care with the package as bailee, after the termination of such liability.<sup>1</sup>

In a suit against an express company for the loss of a package by the delivery of it to the wrong person, the court declined to examine the question whether the liability of the company, under the contract, was that of a common carrier or of a warehouseman,—because, in either case, the company was bound to deliver to the right person.<sup>2</sup>

*Root*, 47 Mich. 231; *Southern Exp. Co. v. Glenn*, 16 Lea, 472; *Southern Exp. Co. v. Norby*, 36 Ga. 635, 91 Am. Dec. 783; *Bardwell v. American Exp. Co.* 35 Minn. 344; *Overland Mail & Exp. Co. v. Carroll*, 7 Colo. 43; *Galt v. Adams Exp. Co.*, McArthur & M. 124; *Wells v. American Exp. Co.* 55 Wis. 23, 42 Am. Rep. 695.

<sup>1</sup> *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691.

<sup>2</sup> *American Exp. Co. v. Stack*, 29 Ind. 27.

An express company is liable for damages to fruit by reason of unreasonable delay in transportation,<sup>1</sup> for an express business involves the idea of promptness and regularity as to route or time, or both.<sup>2</sup> Where there are two routes for sending goods by express, the one safe and the other hazardous, and yet the express company, in defiance of the wishes of the owner, rejects the safe route and adopts the hazardous one, and the goods are lost by robbery, the company is liable.<sup>3</sup>

A stipulation in an express contract that claim for loss or damage shall be presented in writing at the office issuing the receipt, is not binding where the loss is by failure to forward the freight promptly, and therefore the negligence is necessarily known to that office.<sup>4</sup> A shipper is presumed to know and assent to the terms of an express company's receipt which is given him for goods,—especially where those terms are made prominent and noticeable, and a book of such blank receipts is in his own possession.<sup>5</sup> Where the receipt or bill of lading given by an express company provides that, in case of loss, proof shall be made within a limited time and in a particular manner, if notice of loss is given within the time limited and no objection is made to its sufficiency, but the objection to payment is put by the company upon other grounds, all defects in such notice will be regarded as waived.<sup>6</sup>

An express company is not liable for a money package which the consignee fails to receive, where the latter for his own convenience, by promising to relieve the agent from responsibility, causes the latter to depart from its known rule to require a receipt before delivery, and to attempt delivery by throwing it to the consignee while he is standing on a car platform.<sup>7</sup> It is within the apparent scope of an express agent's authority to make an arrangement with the consignee of a trunk, before

<sup>1</sup> *Adams Exp. Co. v. Williams* (Ark.) June 4, 1890.

<sup>2</sup> *Retzer v. Wood*, 109 U. S. 185, 27 L. ed. 900.

<sup>3</sup> *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 19 L. ed. 457.

<sup>4</sup> *Baltimore & O. Exp. Co. v. Cooper*, 66 Miss. 558, 40 Am. & Eng. R. Cas. 97.

<sup>5</sup> *Ballou v. Earle*, 14 L. R. A. 433, 17 R. I. 441; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453.

<sup>6</sup> *Merrill v. American Exp. Co.* 62 N. H. 514.

<sup>7</sup> *Carroll v. Southern Exp. Co.* 37 S. C. 452.

the payment of the charges and the signing of the receipt therefor, to leave it in the express office until the next day, with a view to giving him a reasonable time to send for the trunk; and such arrangement will bind the company in the absence of notice to the consignee of any restriction on the agent's authority.<sup>1</sup> An express company was not liable for the loss of a trunk which reached the Grand Central Depot in New York about twenty-four hours ahead of the passenger, although its employes took it out of the baggage car on arrival, but left it in possession of the railroad company, in the baggage room, and an agent of the express company obtained the check from the passenger upon the train, but when it was presented to the railroad employes within seven minutes after the arrival of the train the trunk could not be found.<sup>2</sup>

An express company is not liable for refusal to accept goods for shipment which are not packed according to its rules, though it had made a previous arrangement with the shipper to transport such goods not so packed, as it has the right to withdraw from such arrangement at any time.<sup>3</sup>

It is within the scope of the authority of an express agent to give rates at which property shipped and reaching the point of destination over the company's line of carriage will be delivered to consignees at the latter point, and bind his company to delivery at such rates; and for a mistake in the rate at which a contract of shipment is made, the company, and not the consignee, is responsible and must bear the loss as between them.<sup>4</sup>

An express company is not bound to transport and deliver any intoxicating liquor, if thereby it would incur a penalty, but an express company, as a general thing, is not bound to know the contents of packages offered for carriage, nor are its agents presumed to know.<sup>5</sup>

<sup>1</sup> *Oderkirk v. Fargo*, 61 Hun, 418.

<sup>2</sup> *Aikin v. Westcott*, 123 N. Y. 363.

<sup>3</sup> *Vicksburg Liquor & T. Co. v. United States Exp. Co.* 68 Miss. 149.

<sup>4</sup> *Southern Exp. Co. v. Boullemer* (Ala.) Nov. 9, 1893.

<sup>5</sup> *State v. Goss*, 59 Vt. 266, 59 Am. Rep. 706.



## § 2. *Distinction in Liability between Carriers of Goods and Passenger Carriers.*

There is a plain distinction between the liabilities of carriers of goods and of passengers.<sup>1</sup> The duty of common carriers with respect to the transportation of persons and property is independent of contract.<sup>2</sup> The liability of a carrier of passengers, like that of a common carrier of goods, arises out of his duty, implied by law; but, unlike that of the latter, it is not that of an insurer. He does not warrant the safety of the passengers at all events, but only that, so far as human care and foresight can reasonably be required to go, their safe conveyance will be provided for.<sup>3</sup>

In the case of the common carrier of goods, the responsibility of an insurer is superadded to the responsibility which arises out of his contract to carry for reward.<sup>4</sup> Carriers are insurers of the goods received by them to be carried against all casualties except those which arise from the act of God, the public enemy, the fault of the shipper, or the inherent quality of the property itself.\* It is, however, not enough that the goods have been lost or injured by the act of God; if the negligence of the carrier himself has in any measure contributed to bring about the injury, he is, nevertheless, liable.<sup>6</sup>

<sup>1</sup> *Aston v. Heaven*, 2 Esp. 533; *Christie v. Griggs*, 1 Campb. 79; *Dodge v. Boston & B. S.S. Co.* 2 L. R. A. 83, 148 Mass. 207; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 18 L. R. A. 393, 111 N. C. 463.

<sup>2</sup> *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, 52 N. J. L. 169, 41 Am. & Eng. R. Cas. 187.

<sup>3</sup> *Smith*, *Mercantile Law* (7th ed.) 282; *Ansel v. Waterhouse*, 6 Maule & S. 393; *Crofts v. Waterhouse*, 3 Bing. 319.

<sup>4</sup> *Riley v. Horne*, 5 Bing. 220; *Fox v. Boston & M. R. Co.* 1 L. R. A. 702, 148 Mass. 220; *Bennett v. Dutton*, 10 N. H. 481; *Hawkins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Stockton v. Frey*, 4 Gill, 407, 45 Am. Dec. 138; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019.

<sup>5</sup> *Harris v. Northern Indiana R. Co.* 20 N. Y. 232; *Bohannan v. Hammond*, 42 Cal. 227; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Moses v. Norris*, 4 N. H. 304; *Harrell v. Owens*, 18 N. C. 273; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Ewart v. Street*, 2 Bail. L. 157, 23 Am. Dec. 131, this being an extension of the rule as laid down by Lord Holt in the leading case of *Coggs v. Bernard*, 2 Ld. Raym. 909.

<sup>6</sup> *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Michaels v. New York Cent. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *New Brunswick, S. & C. Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Hill v. Sturgeon*, 28 Mo. 323.

But there is no difference between carriers by land and carriers by water in respect to their rights, duties and obligations; each incurs the same liabilities and is subject to the same duties and is governed by the same rules of law.<sup>1</sup> All vessels employed in transporting goods from port to port are carriers, and as such are liable for the safe custody, due transport and right delivery of the goods.<sup>2</sup> The master is bound to carry the goods on his own ship to their destination unless prevented by the act of God, the public enemy, or some peril excepted in the contract of shipment. In the absence of a special contract, the carrier is ordinarily liable under his common law obligation, without establishing negligence in the transportation of property.<sup>3</sup>

By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship carrying goods for hire whether employed in internal, in coasting or in foreign, commerce, is a common carrier, with the liability of an insurer against all losses, except only such as arise from irresistible causes, as the act of God and public enemies.<sup>4</sup> Carriers of merchandise by water are insurers, and liable for every loss or damage to the merchandise, unless it happened by the act of God, the public enemy, the shipper, or by some other cause excepted in the contract of shipment.<sup>5</sup>

A common carrier who insures a cargo, accepted by him to carry from New York to Buffalo, against all losses excepting those occasioned by theft, robbery or barratry of the master or crew of the vessel on which they are shipped, or want of care and

<sup>1</sup> *King v. Shepherd*, 3 Story, 349; *Elliott v. Rossell*, 10 Johns. 1; *Barter v. Leland*, Abb. Adm. 350; *Maury v. Talmadge*, 2 McLean, 157; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 428, 12 L. ed. 465; *Dale v. Hall*, 1 Wils. 281.

<sup>2</sup> *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 43, 17 L. ed. 609.

<sup>3</sup> *Down v. St. Louis, K. & N. W. R. Co.* 38 Mo. App. 408.

<sup>4</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788; *Barclay v. Cucullay Gana*, 3 Dougl. 389; *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 23, 16 L. ed. 41, 46; *Germania Ins. Co. v. The Lady Pike*, 88 U. S. 11 Wall. 1, 14, 22 L. ed. 499, 503; 2 Bac. Abr. title "Carriers" a; 2 Kent, Com. 598, 599; Story, Bailm. § 501.

<sup>5</sup> *Germania Ins. Co. v. The Lady Pike*, and *The Niagara v. Cordes*, *supra*; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

skill, may recover the full value of the goods insured by him on showing a loss by fire, for which he is answerable.<sup>1</sup>

By the general custom, or, as it is termed in England, the custom of the realm, which is the foundation of the common law on the subject, the common carrier intrusted with goods for carriage is responsible at all events for every injury arising in any other way than by the act of God or of public enemies.<sup>2</sup> Loss by flood or storm is loss by the act of God; and a common carrier is excused when the damage resulted from this cause immediately.<sup>3</sup> His responsibility is established with a view to public policy, to the reward which he receives, to his character as an insurer and to the terms of his contract, express or implied.<sup>4</sup> He must answer for all losses not caused by the act of God or the King's enemies.<sup>5</sup> The act of God means something quite different from what is expressed by the terms "inevitable accident" as these are ordinarily used. In fact, the carrier has been held answerable for losses caused by accidents which were to him entirely inevitable.<sup>6</sup> Where the loss happens in any way through the agency of man it cannot be considered the act of God.<sup>7</sup>

The carrier of goods is liable in all events and for every loss or damage, unless it happens by the act of God, or the public enemy, or without fault on his part under some express exception in the bill of lading.<sup>8</sup> A freight carrier remains liable for loss through its negligence, under a contract of shipment of fruit providing that the same shall be at the owner's risk, where the contract does

<sup>1</sup> *Van Natta v. Mutual Security Ins. Co.* 2 Sandf. 490; *Edwards*, Bailm. 356.

<sup>2</sup> *Coggs v. Bernard*, 2 Ld. Raym. 919; *Dale v. Hall*, 1 Wils. 281.

<sup>3</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

<sup>4</sup> *Jeremy*, Carriers, 31-38.

<sup>5</sup> *Morse v. Shue*, T. Raym. 220, 1 Vent. 190, 238; *Colt v. McMechen*, 6 Johns. 160, 5 Am. Dec. 200.

<sup>6</sup> *Abbott*, Shipping, pt. 3, chap. 4, § 1; *Forward v. Pittard*, 1 T. R. 34; *McArthur v. Sears*, 21 Wend. 196; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127.

<sup>7</sup> *Forward v. Pittard*, 1 T. R. 27; *Campbell v. Morse*, 1 Harp. L. 468; *Elliott v. Rossell*, 10 Johns. 1; *Robertson v. Kennedy*, 2 Dana, 43, 26 Am. Dec. 466; *Gordon v. Buchanan*, 5 Yerg. 82; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Amies v. Stevens*, 1 Strange, 128; *Edwards*, Bailm. 456.

<sup>8</sup> *Siccutt v. Boston H. & E. R. Co.* 5 Nat. Bankr. Reg. 243; *The Lady Pike*, 2 Biss. 145; *The Molly Mohler*, 2 Biss. 508; *Amies v. Stevens*, 1 Strange, 128; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779; *Elliott v. Ros-*

not in clear and unmistakable terms exempt it from such liability. It is liable for loss by fire produced from other than natural causes, whether accidentally or communicated from other vessels or from the shore, and whether it produces the motive power or not.<sup>2</sup> The failure, however, of a cotton press company to perform its agreement with carriers to insure for its full insurable value, covering all interests, including the owner's, all cotton delivered to it for compression, does not impose on the carrier any obligation to insure, or render it liable as an insurer of the cotton.<sup>3</sup>

A carrier of goods is liable, whether he is careful or not, for any act or omission not caused by the act of God or the public enemy.<sup>4</sup> And although a common carrier is not responsible for the destruction or loss of goods by the act of the public enemy, he is, nevertheless, bound to use due diligence to prevent such destruction or loss and if his negligence contributed thereto, he will be liable.<sup>5</sup> Where an obligation or duty is imposed upon a person by law, he will be absolved from liability for non-performance of the obligation, if such non-performance was occasioned by the act of God. The rule is illustrated in the case of common carriers in *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep.

*sell*, 10 Johns. 1; *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Hollister v. Nowlen*, 19 Wend. 234; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 428, 12 L. ed. 465; *Trent & M. Nav. Co. v. Wood*, 4 Dougl. 287, 3 Esp. 127; *Seiwall v. Allen*, 6 Wend. 335; *Ashmole v. Wainwright*, 2 Q. B. 837; *Ansell v. Waterhouse*, 2 Chitty, 1; *Bretherton v. Wood*, 3 Brod. & B. 54; *Hilde v. Trent & M. Nav. Co.* 1 Esp. 36; *Hinton v. Dibbin*, 2 Q. B. 646; *Richardson v. Winsor*, 3 Cliff. 401; *Colt v. McMechen*, 6 Johns. 160, 5 Am. Dec. 200; *Nichols v. De Wolf*, 1 R. I. 277.

<sup>1</sup> *Giles v. Fargo*, 43 N. Y. S. R. 65.

<sup>2</sup> *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 315, 15 L. ed. 657; *Singleton v. Hillyard*, 1 Strobb. L. 203; *Hall v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 372, 20 L. ed. 596; *Rockingham Mut. F. Ins. Co. v. Bosher*, 39 Me. 253, 63 Am. Dec. 618; *Gilmore v. Carman*, 1 Smedes & M. 279, 40 Am. Dec. 96; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 425, 12 L. ed. 465; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539, 39 Am. Dec. 398; *The City of Norwich*, 3 Ben. 579; *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455; *Hunt v. Morris*, 6 Mart. (La.) 676; *Miles v. Cattle*, 6 Bing. 743; *Lyon v. Mells*, 5 East, 428; *Grill v. General Iron Screw Collier Co.* L. R. 1 C. P. 600.

<sup>3</sup> *Laurest Mills v. Merchants C. P. & S. Co.* 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1.

<sup>4</sup> *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143, and authorities cited.

<sup>5</sup> *Holliday v. Kennard*, 79 U. S. 12 Wall. 254, 20 L. ed. 390.

440. A carrier is not bound to the highest degree of diligence to preserve the property from injury resulting from the act of God, but is required to bestow such care as an ordinarily prudent person or carrier would use under like circumstances, and is liable for failure to do so.<sup>1</sup> But it is liable where its negligence, mingled with the act of God, caused loss.<sup>2</sup> Still, in the case of loss by flood or storm, if it is charged that the carrier's negligence contributed to the loss, proof of this must come from those who assert or rely upon it. Though a shipper assumes the duty of loading the property, the carrier is liable for the injury which was likely to result from moving the car by reason of the manner of loading.<sup>3</sup> A common carrier of merchandise is an insurer of property and its liability is not relieved by the fact that the property was loaded by the owner or that he accompanies it.<sup>4</sup> A carrier's liability for freight arises from its failure to make an absolutely safe carriage and delivery which it assumes by its undertaking.<sup>5</sup> In a contract for carriage, a common carrier is an insurer, until the transit is ended, and then liable only as warehouseman during such reasonable time as the goods are in its custody awaiting the call of the consignee.<sup>6</sup> But a common carrier cannot be held liable only as a warehouseman, until its contract as carrier has been fulfilled.<sup>7</sup>

Where the transportation of an article or thing involves, in itself, extraordinary risks, and an injury occurs in consequence thereof, the carrier is only liable where he has been negligent;<sup>8</sup> as in transportation of animals by land or sea.<sup>9</sup> The explosion of

<sup>1</sup> *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197.

<sup>2</sup> *Haney v. Kansas City*, 94 Mo. 334, and authorities there collected.

<sup>3</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Doan v. St. Louis, K. & N. W. R. Co.* 38 Mo. App. 408.

<sup>4</sup> *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

<sup>5</sup> *Jacobs v. Tutt*, 33 Fed. Rep. 412.

<sup>6</sup> *Bassett v. Connecticut River R. Co.* 145 Mass. 129; *Blaisdell v. Connecticut River R. Co.* 145 Mass. 132.

<sup>7</sup> *Wheeler v. Oceanic Steam Nav. Co.* 52 Hun, 75.

<sup>8</sup> *McDonald v. Highland R. Co.* 2 Ct. of Sess. (3d Series) 614.

<sup>9</sup> *Blower v. Great Western R. Co.* L. R. 7 P. C. 656; *Kendall v. London & S. W. R. Co.* L. R. 7 Exch. 373, 41 L. J. Exch. 184; *Nugent v. Smith*, L. R. 1 C. P. Div. 423, 45 L. J. C. P. 697.

a package of nitro-glycerine while in the hands of a carrier who has received it without information as to its dangerous character, will not render the carrier liable.<sup>1</sup> But common carriers are responsible for the wrongful acts of mere strangers in regard to property committed to them for transportation.<sup>2</sup>

### § 3. *Carriers by Rail Must Furnish Suitable Cars.*

One of the obligations of the common carrier of freight by railroad, universally recognized, is that requiring it to supply safe and suitable cars for the transportation of all freight usually transported over railroads.<sup>3</sup> A railroad company cannot discontinue an established switch connection with a coal mine, merely because the cars of another company may be taken upon its line over such switch, thereby endangering its property and the lives of its passengers and employes.<sup>4</sup> The company is required to have suitable brakes upon its cars and in suitable repair; and if it neglects this duty and an accident results from such neglect, liability attaches for resulting injuries.<sup>5</sup> It will be liable for injury from the defects of a car, even if it belongs to another company, if it adopts it for the purposes of its own transit.<sup>6</sup>

Where the shipper voluntarily makes his own selection of the means of transportation, unless the carrier fails to disclose some inherent defect known to him, he will be released from any loss occurring through a defect which does not charge him with negligence.<sup>7</sup> If it furnishes unfit or insufficient vehicles, he is not ordinarily exempted from responsibility by the fact that the shipper

<sup>1</sup> *Parrott v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206.

<sup>2</sup> *Barclay v. Cucullay Gana*, 3 Dougl. 389; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127, 4 Dougl. 287.

<sup>3</sup> *Smith v. New Haven & N. R. Co.* 12 Allen, 531, 90 Am. Dec. 166; *Pratt v. Ogdensburg & L. C. R. Co.* 102 Mass. 557, 89 U. S. 22 Wall. 123, 134, 22 L. ed. 827, 831; *Potts v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 394; *Mason v. Missouri Pac. R. Co.* 25 Mo. App. 473; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490.

<sup>4</sup> *Chicago & A. R. Co. v. Suffern*, 27 Ill. App. 404, affirmed in 129 Ill. 274.

<sup>5</sup> *Costello v. Syracuse, B. & N. Y. R. Co.* 65 Barb. 92; *Illinois Cent. R. Co. v. Buches*, 55 Ill. 379.

<sup>6</sup> *Combe v. London & S. W. R. Co.* 31 L. T. N. S. 613.

<sup>7</sup> *Carr v. Schaffer*, 15 Colo. 48.

knew them to be defective.<sup>1</sup> But when the owner of the property to be transported makes his selection of the vehicles under circumstances which charge him with full knowledge of all their capabilities and defects, there being safe vehicles offered him, at reasonable rates, the company is not responsible for any injury which may result exclusively from such defects.<sup>2</sup> But it is sufficient if the company provides a carriage which, without extraordinary accident, will probably perform the journey.<sup>3</sup>

It is a carrier's duty to equip its road with instrumentalities of carriage suitable for the traffic it undertakes to carry, and to furnish them alike to all who have occasion for their use; and its duty to furnish equipment cannot be transferred to or required of shippers.<sup>4</sup> The rule requiring a shipper to clean and repair cars furnished on a side track is unreasonable.<sup>5</sup>

A statute which provides for brakemen on trains, applies to passenger trains and freight trains considered separately, and cannot be applied to a mixed train; but the duty in regard to such trains is to provide the usual and proper appliances.<sup>6</sup>

#### § 4. *Cars Must be Adapted to their Intended Use.*

See also § 58.

A railway company is bound to provide cars reasonably fixed for the conveyance of the particular class of goods it undertakes to carry.<sup>7</sup> It is the duty of the carrier to provide suitable means of transportation adapted in each case to the particular class of goods he undertakes to transport. He must protect his goods from destruction or injury by the elements, from the effects of delay, from every source of injury which, in the exercise of care and ordinary intelligence, may be known or anticipated. The nature of the goods must be considered in determining the carrier's duty.

<sup>1</sup> *Ogdenburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827.

<sup>2</sup> *Harris v. Northern Indiana R. Co.* 20 N. Y. 232, 235.

<sup>3</sup> *Amies v. Stevens*, 1 Strange, 128; *Great Western R. Co. v. Blower*, 41 L. J. C. P. 268, L. R. 7 C. P. 655.

<sup>4</sup> *Rice v. Western N. Y. & P. R. Co.* 3 Inters. Com. Rep. 162.

<sup>5</sup> *Joyner v. South Carolina R. Co.* 26 S. C. 49.

<sup>6</sup> *Macloon v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>7</sup> *Lyon v. Wells*, 5 East, 428; *Shaw v. York & N. M. R. Co.* 13 Q. B. 347.

Where the marks on the package and the waybill disclosed that the subject of shipment is such as should be transported in refrigerator cars during warm weather, the carrier will be liable for neglect in providing such means of transportation.<sup>1</sup>

A carrier's duty is not limited to the transportation of goods delivered for carriage. He must exercise such diligence as is required by law to protect the goods from destruction and injury from any source, which may be averted and which, in the exercise of care and ordinary intelligence may be known or anticipated. Many articles of commerce, when transported, must be protected from storms, rain, sunshine and heat, and must have cars suitable for their safe transportation. Thus, the sealing of a car containing butter, when received from a connecting carrier, is no excuse for failure to put ice in the car, if necessary to protect the butter from the heat. Nor can a carrier that has accepted butter for transportation escape liability for damage to the butter from the heat during transportation by the fact that it did not have refrigerator cars which were ready for use; at least when it could have been carried safely by the use of ice in the cars which were used. Where no specific agreement is shown for any specific class of cars, and nothing is said about the character of the cars to be used in the transportation of an article shipped which requires to be protected from heat, the railroad company is bound to provide refrigerator or other cars in which ice can be used to protect the commodity when necessary, although the rate of charges named is the rate for common cars.<sup>2</sup>

The carrier must guard the goods from injury from the effects

<sup>1</sup> *Rice v. Western N. Y. & P. R. Co.* 3 Inters. Com. Rep. 162; *Beard v. Illinois Cent. R. Co.* 7 L. R. A. 280, 79 Iowa, 518; *Mason v. Missouri Pac. R. Co.* 25 Mo. App. 473; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Hewitt v. Chicago B. & Q. R. Co.* 63 Iowa, 612; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 21 L. ed. 827; *Potts v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 394; *Boscovitz v. Adams Exp. Co.* 93 Ill. 525, 34 Am. Rep. 191; *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Wing v. New York & E. R. Co.* 1 Hilt. 241; *Hackins v. Great Western R. Co.* 17 Mich. 62, 97 Am. Dec. 179, 18 Mich. 427; *Merchants Despatch & Transp. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490; *Paramore v. Western R. Co.* 53 Ga. 385.

<sup>2</sup> *Beard v. Illinois Cent. R. Co.* 7 L. R. A. 280, 79 Iowa, 518.



of delay. Some articles may be transported safely in open cars, and others, when so carried, may prevent the carrier from availing himself of an exception in his bill of lading. Thus, cotton, though its carriage be thus exempted from the peril of fire, must not be needlessly exposed to danger.<sup>1</sup> The failure to provide the appliances by which a locomotive was made to consume its own sparks, may avoid the exemption from the peril of fire in favor of the carrier.<sup>2</sup> But, this requirement does not impose upon the carrier the use of every possible prevention not reduced to practical use,—but only such as the test of experience and reason has shown to be practicable.<sup>3</sup> Indeed, there are cases which deny that it is the duty of a carrier to provide special cars,—such as are in use by other carriers—for the purpose of transporting special classes of freight.<sup>4</sup>

### § 5. *When Failure to Furnish Cars Excused.*

Refusing to furnish cars for transportation, when all cars are needed for transportation of freight which has accumulated along the line is not a violation of the Interstate Commerce Act. But it is the duty of the carrier to furnish cars ratably to shippers along its line until the emergency is passed. At times of special pressure, regular customers are not entitled to preference over occasional ones. Shipper need not make special contract with carrier to be entitled to transportation of goods. Less desirable freight must be accepted upon reasonable terms, as well as that which is more desirable. When equipment of carrier usually applied to transportation of a particular article is not equal to the demand, carrier must appropriate other cars to such service. Carrier is not justified in refusing cars for transportation of coal at certain points

<sup>1</sup> *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320; *Empire Transp. Co. v. Wamsutta Oil R. & M. Co.* 63 Pa. 14, 3 Am. Rep. 515; *Insurance of N. A. v. St. Louis, I. M. & S. R. Co.* 3 McCrary, 233.

<sup>2</sup> *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673.

<sup>3</sup> *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Ford v. London & S. W. R. Co.* 2 Fost. & F. 730.

<sup>4</sup> *Wetzell v. Chicago & A. R. Co.* 12 Mo. App. 599; *Udell v. Illinois Cent. R. Co.* 13 Mo. App. 254.

by the fact that it could make more money by using its regular coal cars on another portion of the line.<sup>1</sup>

A railway corporation, when sued for its failure to furnish a shipper with cars on request, must show its inability to furnish such cars, even though plaintiff has expressly pleaded the contrary, the facts being peculiarly within the knowledge of defendant.<sup>2</sup> Delivery of cars by a railroad company at any hour during the day for which they are ordered, though too late to be used that day, is sufficient where no hour has been specified in the order.<sup>3</sup>

An unavoidable accident is no excuse for breach of an express contract of a railroad company to furnish cars on a certain day.<sup>4</sup> Nor will heavy and unprecedented traffic release a carrier from the consequences that result from a breach of a contract to furnish cars at a specified time.<sup>5</sup> A contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is valid as to acts done in performance of it, and until revoked.<sup>6</sup> A stipulation in a written contract of interstate shipment, releasing the carrier from liability for damages sustained by the breach of a prior verbal contract to supply cars for shipment, is unreasonable, oppressive, and invalid.<sup>7</sup> An oral contract to provide transportation on a certain day is not, after a breach and damages, merged in a subsequent written contract of shipment duly performed, so as to deprive the shipper of his right to recover damages for the breach.<sup>8</sup>

A local railroad station agent's lack of authority of which the shipper had no knowledge, to make a verbal contract to supply cars for transportation, will not relieve the company from liability for a breach of such contract which is within the apparent

<sup>1</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

<sup>2</sup> *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

<sup>3</sup> *McGraw v. Missouri Pac. R. Co.* 109 Mo. 582.

<sup>4</sup> *Shulbrick v. Salmond*, 3 Burr. 1637.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Hume*, 6 Tex. Civ. App. 653.

<sup>6</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

<sup>7</sup> *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) May 3, 1890.

<sup>8</sup> *McAbsher v. Richmond & D. R. Co.* 108 N. C. 344.

scope of his general authority.<sup>1</sup> A station agent for a railroad company has authority to make a special contract binding upon the company, to furnish cars at the station for shipment on a specified day.<sup>2</sup>

The act of the 20th Texas legislature imposing a penalty upon railroad companies for failure to furnish freight cars, after demand therefor in writing, does not abrogate the common law right to recover from a company damages caused by its breach of a verbal contract to furnish cars.<sup>3</sup>

### § 6. *Duty of Carrier by Water to Furnish Seaworthy Vessel, etc.*

The carrier by water must supply a seaworthy vessel, well furnished with proper motive power and necessary equipment.<sup>4</sup> Want of readiness of a vessel to receive cargo at the time a notice that she is ready is given, is waived by failure to object, where she could, at the time of giving the notice, have been put in readiness in two days by the work of three men.<sup>5</sup> But an express covenant to have a ship at a certain port by a certain day is not excused by inability to fulfill it because of contrary winds and bad weather.<sup>6</sup> An act of God does not excuse a carrier for failure to perform its express contract to transport within a reasonable time.<sup>7</sup> Where there is nothing said on the subject, seaworthiness is an implied condition of a hiring of shipping.<sup>8</sup> A warranty of seaworthiness is absolute in every contract for the carriage of goods by sea, unless otherwise expressly stipulated.<sup>9</sup> Where the owner of a vessel charts her or offers her for trade, he is bound to show that she is seaworthy and suitable for the

<sup>1</sup> *Missouri, K. & T. R. Co. v. Graves, supra.*

<sup>2</sup> *Easton v. Dudley*, 78 Tex. 236, 45 Am. & Eng. R. Cas. 340; *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33; *Missouri, K. & T. R. Co. v. Graves, supra.*

<sup>3</sup> *Missouri Pac. R. Co. v. Harmonson* (Tex. App.) April 23, 1890.

<sup>4</sup> *Germania Ins. Co. v. The Lady Pike*, 88 U. S. 21 Wall. 1, 22 L. ed. 499.

<sup>5</sup> *Wencke v. Vaughan*, 60 Fed. Rep. 448.

<sup>7</sup> *Shulbrick v. Salmond*, 3 Burr. 1637.

<sup>6</sup> *Van Buskirk v. Roberts*, 31 N. Y. 661.

<sup>8</sup> *Lyon v. Tiffany*, 76 Mich. 158.

<sup>9</sup> *The Caledonia*, 43 Fed. Rep. 681.

service in which she is employed. If there are defects known or unknown, he is not excused. He is obliged to keep her in proper repair unless prevented by perils of the sea or inevitable accident.<sup>1</sup>

The owners of a vessel under charter are bound, under the covenant for seaworthiness, to have the vessel in proper condition for her voyage at the time of breaking ground; and this obligation is not affected by an express warranty of seaworthiness of the vessel which contains no provision as to when it shall attach.<sup>2</sup>

A clause in a bill of lading of cattle shipped upon a vessel, by which the shipper assumes all risk of the fittings, is void as against public policy, in so far as it relates to a defective condition of the fittings through insufficient fastening due to the negligence of the employes of the vessel, and unknown to the shipper at the time of sailing.<sup>3</sup> Under a contract for the lease of shipping providing that the lessees assume all liability for loss or damage to the cargoes from whatever cause, and that neither the lessor nor the shipping itself shall be held responsible, nothing being said about seaworthiness, the lessor is liable for damage occasioned by an excessive leakage.<sup>4</sup> To constitute seaworthiness of the hull of a vessel in respect to the cargo, the hull must be so tight, staunch and strong as to be able to resist all ordinary action of the sea, and to prosecute and complete the voyage, without damage to the cargo under deck.<sup>5</sup>

A vessel is ordinarily presumed to have been seaworthy upon commencing her voyage; but the presumption is otherwise where, shortly after its commencement, without encountering any stress of weather or unusual peril, she becomes so leaky as to be obliged to put into a port of refuge for repairs.<sup>6</sup>

Prima facie the fact of injury to a cargo from a leak in a vessel makes a case of negligence against the carrier; throwing upon him the burden of proving that the direct cause was a peril of the

<sup>1</sup> *Work v. Leathers*, 97 U. S. 379, 24 L. ed. 1012; *The Keokuk v. Home Ins. Co.* 76 U. S. 9 Wall. 526, 19 L. ed. 746; *The Northern Belle v. Robson*, 76 U. S. 9 Wall. 526, 19 L. ed. 748.

<sup>2</sup> *Borring v. Thebaud*, 56 Fed. Rep. 520.

<sup>3</sup> *The Iowa*, 50 Fed. Rep. 561.

<sup>4</sup> *Lyon v. Tiffany*, 76 Mich. 158.

<sup>5</sup> *Dupont v. Vance*, 60 U. S. 19 How. 162, 15 L. ed. 584.

<sup>6</sup> *Broadnar v. Cheroke & S. R. Co.* 1 Pa. Dist. Rep. 251.

sea.<sup>1</sup> But unseaworthiness in a vessel cannot be inferred from the mere fact of the slacking of a cargo of lime while on board.<sup>2</sup> A vessel cannot be deemed unseaworthy because her decks had a year before been repaired, and opened and leaked after being exposed to a hurricane, where after recaulking she safely crossed the Mediterranean and Atlantic in much rough weather.<sup>3</sup>

The fact of a welding defect at the place of the fracture of the shaft of a ship's engine will not show unseaworthiness, if the solid part of the shaft at that place is mathematically established to have been nearly two and one half times the strength required for the performance of the ordinary duty in navigating the ship.<sup>4</sup> And where damage to cargo was caused by water taken aboard through a bilge pump hole, if there be any doubt upon the evidence whether the cap and plate covering that hole were in good condition and knocked off through extraordinary contingencies, that doubt must be resolved against the charterer.<sup>5</sup> Where a cargo of sugar in the hold of a vessel was injured by water, and the limber holes were stopped up, preventing the water from running into the wells, and the pumps were out of order and practically useless, and the windows through which it was claimed that some of the water came were not shuttered, the vessel is liable for the damages.<sup>6</sup> A vessel is liable for damage to a cargo of ice, caused by the escape of steam from a defective drip valve.<sup>7</sup> A ship is liable for injuries sustained, by persons unloading a cargo, by the falling of a platform on account of a defective support which officers of the ship permitted to be used, although they advised the men not to put too much weight upon it.<sup>8</sup> The owner is liable for damage to the cargo from the sinking of an old and insufficient bridge or from the timber of the bridge being rotten.<sup>9</sup>

<sup>1</sup> *The Samuel E. Spring*, 29 Fed. Rep. 397.

<sup>2</sup> *Singleton v. Phoenix Ins. Co.* 132 N. Y. 298.

<sup>3</sup> *The Marlborough*, 47 Fed. Rep. 667.

<sup>4</sup> *Sweeney v. Thompson*, 39 Fed. Rep. 121.

<sup>5</sup> *Bradley Fertilizer Co. v. The Edwin I. Morrison*, 153 U. S. 199, 38 L. ed. 688.

<sup>6</sup> *The Charles J. Willard*, 38 Fed. Rep. 759.

<sup>7</sup> *The Saugerties*, 44 Fed. Rep. 625.

<sup>8</sup> *Keliher v. The Nebo*, 40 Fed. Rep. 31.

<sup>9</sup> *The Keokuk v. Home Ins. Co.* 76 U. S. 9 Wall. 526, 19 L. ed. 746; *The Northern Belle v. Robson*, 76 U. S. 9 Wall. 526, 19 L. ed. 748.

### § 7. *Carrier by Water Must Answer for Competency of Officers and Crew.*

The owner of a vessel engaged in service as common carrier must see that the master is competent, skillful, of sound judgment and discretion and of sufficient knowledge and experience,<sup>1</sup> and that the crew is sufficient in numbers and qualified for its duties, as both the owners and vessel are responsible for their want of skill and judgment, or for their negligence.<sup>2</sup>

Owners of a vessel are guilty of negligence toward the owners of cargo in employing a master of such intemperate habits and so addicted to intoxication as to render him unfit for his position. The owners of a vessel are liable to the owners of cargo for damages from a collision occurring in the master's watch while the navigation was in sole charge of the second mate, where such master was incompetent by reason of his habits of intoxication, and the owners were guilty of negligence in his appointment, and at the time of the collision there was instant need of a master's skill and experience, but the master was stupefied with drink, and when he got on deck a few minutes after the collision, gave a wrong order which the second mate was obliged to reverse.<sup>3</sup> The owner of the vessel is responsible for the direct negligence or any wrong doing of the master which is done by him as master in the discharge of his duty and under the authority given him as master.<sup>4</sup>

The owner of the ship as well as the master, is responsible for the goods which he has undertaken to carry, if stolen or embezzled by the crew, or by any other person, though no fault or negligence may be imputable to him.<sup>5</sup>

The responsibility of owners for the acts of the master is not, however, universal, but is confined to cases within the scope of

<sup>1</sup> *The Guildhall*, 58 Fed. Rep. 796.

<sup>2</sup> *Ward v. Chamberlain*, 62 U. S. 21 How. 572, 16 L. ed. 219.

<sup>3</sup> *The Guildhall*, 58 Fed. Rep. 796; *Chamberlain v. Ward*, 62 U. S. 21 How. 548, 16 L. ed. 211; *Germania Ins. Co. v. The Lady Pike*, 88 U. S. 21 Wall. 1, 22 L. ed. 499.

<sup>4</sup> *Sheffield v. Puige*, 1 Sprague, 285; *Hunt v. Colburn*, 1 Sprague, 215; *Foster v. Sampson*, 1 Sprague, 182; 2 Parsons, Ship. & Adm. 29.

<sup>5</sup> *Schieffelin v. Horvey*, 6 Johns. 170, 5 Am. Dec. 206; *Watkinson v. Laugh-ton*, 8 Johns. 213.

the authority confided to him.<sup>1</sup> They are not, therefore, liable for acts of piracy committed by him.<sup>2</sup> A master cannot abandon his ship and cargo upon any grounds when it is possible by human exertions, skill and prudence to save them from impending peril. It depends upon the circumstances, whether the act of the master in seeking shelter in a harbor, was reasonable and necessary, and if it was, then he is not in fault. Masters have a right and often it is their duty to seek shelter from a storm.<sup>3</sup> After stranding, it is the master's duty to take all possible care of the cargo.<sup>4</sup> The master was held guilty of the grossest negligence for not having made any effort himself or requested it of others, either to get his steamer off when stranded, or to remove and store the goods in port.<sup>5</sup>

It is the duty of the master of a vessel to acquaint himself with the laws of the country with which he is trading and to conform his conduct with those laws. He cannot defend himself where he has been negligent under an asserted ignorance or erroneous information on the subject.<sup>6</sup>

The rule of mercantile law, making the master of a vessel liable for the negligent acts of those under his authority to the same extent as if he were the owner, applies without regard to the question whether the officers or men were employed by himself or the owners.<sup>7</sup> A steamship company which keeps medicines on hand for the use of passengers in case of sickness is bound to keep them arranged so that a physician of ordinary skill can select them when asked for, and is liable where, on account of their being badly arranged, the ship's physician gives a passenger a different medicine from that called for, from which the latter suffers permanent injuries.<sup>8</sup>

<sup>1</sup> *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110; *The Rebecca*, 1 Ware, 188; *The Druid*, 1 W. Rob. Adm. 391; *The Waldo*, 4 Law. Rep. 382; *The Casco*, 4 Law. Rep. 471.

<sup>2</sup> *Dias v. The Revenge*, 3 Wash. C. C. 262; *The Dundee*, 1 Hagg. Adm. 109, 113, 120.

<sup>3</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

<sup>4</sup> *The Portsmouth v. Onondaga Salt Co.* 76 U. S. 9 Wall. 682, 19 L. ed. 754.

<sup>5</sup> *The Niagara v. Cordes*, *supra*.

<sup>6</sup> *Holland v. Greenway*, 63 U. S. 22 How. 491, 16 L. ed. 391.

<sup>7</sup> *Kennedy v. Ryall*, 67 N. Y. 379.

<sup>8</sup> *Allan v. State SS. Co.* 29 N. Y. S. R. 288.

Where the freighter hires the possession, command and navigation of the ship for the voyage, he becomes the owner and is responsible for the conduct of the master and mariners; and the general owner is not liable for the nondelivery of goods shipped or of goods lost.<sup>1</sup> In Massachusetts, the charterer of a vessel is declared to be the owner in respect to responsibility for embezzlement by the crew in case he navigates the vessel at his own expense.<sup>2</sup> In case of abandonment to indemnitors, the latter become, by relation, owners from the time of the loss on account of which the abandonment was made, and they are consequently liable for all repairs and necessary expenses incurred after the loss.<sup>3</sup>

### § 8. *Duty of Carrier of Goods to Inspect Present Condition of Implements of Transportation.*

The rule already stated as to the duty of inspecting the present condition and soundness of the machinery and means of transporting passengers is equally applicable to the common carriers of goods.<sup>4</sup> The failure of the owners to have a vessel thoroughly inspected after a prior accident to her, is inexcusable negligence. It is their duty to have her often examined, and thoroughly inspected.<sup>5</sup> After a freight tank car has just returned from one long journey, it is the duty of the carrier, before permitting it to start out loaded on another distant run, in which the lives and safety of brakemen, trainmen, and the property of the shipper will be involved, to have such car carefully inspected by a competent inspector, in order to ascertain whether it is in a safe condition for

<sup>1</sup> *Christie v. Lewis*, 2 Brod. & B. 410; *Marcadier v. Chesapeake Ins. Co.* 12 U. S. 8 Wheat. 605, 5 L. ed. 696; *Pitkin v. Brainerd*, 5 Conn. 451, 13 Am. Dec. 79; *Latham v. Lawrence*, 13 Conn. 299; *Clarkson v. Edes*, 4 Cow. 470; *Reynolds v. Toppan*, 15 Mass. 370, 8 Am. Dec. 110; *Emery v. Hersey*, 4 Me. 407, 16 Am. Dec. 268; *Lander v. Clark*, 1 Hall, 355; *Calvin v. Newberry*, 6 Bligh, N. S. 189; *Pickman v. Woods*, 6 Pick. 251.

<sup>2</sup> Rev. Stat. of 1835, ¶ 1, cl. 32, § 3.

<sup>3</sup> *United Ins. Co. v. Robinson*, 2 Cal. 280; *United Ins. Co. v. Scott*, 1 Johns. 106; *Reade v. Commercial Ins. Co.* 3 Johns. 352, 3 Am. Dec. 495; *Lee v. Boardman*, 3 Mass. 238, 3 Am. Dec. 134; 2 Emerigon, Ins. 194, 196; Pothier, Contract d' Assurance, 138.

<sup>4</sup> See "Imposed Duties Passenger Carriers," § 19.

<sup>5</sup> *The Northern Belle v. Robson*, 76 U. S. 9 Wall. 526, 19 L. ed. 748.



such service.<sup>1</sup> But a master of a vessel is not guilty of improper conduct in failing to have her decks renewed upon putting into port after passing through a hurricane, when everything recommended by the surveyors, one of whom represented the cargo as agent of the underwriters, was done.<sup>2</sup>

### § 9. *Discrimination Between Express Companies in Furnishing Facilities.*

In New Hampshire, it was held that a railroad company was bound to furnish equal facilities to all express companies, for the transportation of their merchandise; and that this rule existed at common law, without the aid of a statute.<sup>3</sup> In Pennsylvania, a special contract with an express company, giving it exclusive privileges of carrying freight upon its passenger trains, was ordered to be canceled.<sup>4</sup> In Illinois, it is said that the duties and liabilities of common carriers are clearly defined by the common law, and have been settled for centuries. In accepting their charters which gave them an artificial existence as common carriers, they necessarily accepted them with all the duties and liabilities, attached by the existing law to the functions of a common carrier. While the law now imposes and always has imposed upon individuals exercising the vocation of a common carrier, the obligation of rendering service to all persons without injustice to any, how utterly unreasonable is it to claim that a corporation is to be permitted to discriminate in its tolls, at its own discretion, and without regard to justice, etc.<sup>5</sup>

In *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31, an action in case for damages was brought under circumstances like those that gave the ground for injunction in the case cited from Pennsylvania. Defendant had refused to

<sup>1</sup> *Michigan Congress Water Co. v. Chicago & G. T. R. Co.* 2 Inters. Com. Rep. 428.

<sup>2</sup> *The Marlborough*, 47 Fed. Rep. 667.

<sup>3</sup> *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72.

<sup>4</sup> *Sandford v. Cattawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667.

<sup>5</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16, 16 Am. Rep. 599.

carry goods for plaintiff because, some years before it had made a contract with another express company to give it the exclusive right to carry express matter on its cars. The court says: "Common carriers are bound to carry indifferently, within the range of their business, for a reasonable compensation, all freight offered. For similar equal services, they are entitled to the same compensation. They cannot legally make unjust and undue preferences nor make unequal and extravagant charges. A toll is granted. But a toll implies uniformity of compensation for equality of service. The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special or undue preference. They owe an equal duty to each citizen. They are allowed to impose a toll but it is not to be so imposed as to specially benefit one and injure another. Such is the common law on the subject. The legislation of the state has been in accordance with these views." Again the court says: "The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences. It implies indifference as to whom they may serve and an equal readiness to serve all that may apply and in the order of their application. The defendants derived their chartered rights from the state. They owe an equal duty to each citizen."<sup>1</sup>

In *Dinsmore v. St. Louis, C. & L. R. Co.* 2 Fed. Rep. 465, two cases were disposed of by Judge Baxter, one in the circuit court of the United States for Kentucky, and the other for Tennessee. On p. 469, Judge Baxter, having treated of the duty to supply all the accommodations and facilities demanded by the business of the country, says: "And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. . . . The defendant, to the extent of its corporate authority, the Union Express Company and all other persons or companies wishing to engage in the carrying of express matter over defendant's road, can enter on that business on equal terms with the complainant. Neither the railroad companies nor the courts can discriminate in favor of one or more parties or against others. All are entitled

<sup>1</sup> See also *International Exp. Co. v. Grand Trunk R. Co. of Canada*, 81 Me. 92.

to the same measure of accommodation who may offer to do the like business, and it is the duty of the court to enforce, whenever applied to this legal rule of impartial justice."

Five cases reported in 10 Fed. Rep. 210, were decided before Justice Miller and Judges McCrary and Treat, arising in the various circuit courts of the United States for Mississippi, Arkansas, Kansas, and Colorado; and Justice Miller, on p. 214, states as the fifth point in his opinion: "I am of the opinion that it is the duty of every railroad company to provide such conveyances, by special cars or otherwise, as are required for the safe and proper transportation of the express matter on their roads; and that the use of their facilities should be extended on equal terms to all who are actually and usually engaged in the express business." In the case of *Southern Exp. Co. v. Memphis & L. R. Co.* 8 Fed. Rep. 799, the complainant, an express company, had been for many years engaged in carrying on an express business over the defendant's railroad. No written contract was ever entered into between the parties, but the business was carried on without objection, and upon terms mutually satisfactory, until some time in the year 1880, when the defendant asserted its own right to transact all the express business upon its line, and attempted to eject the complainant therefrom. Upon the application of complainant, a temporary injunction was granted; and, upon a motion to dissolve the same, McCrary, *J.*, said that it was the duty of the defendant, as a public servant, to receive and carry goods for all persons alike, without injurious discrimination as to rates or terms; that railroad companies must carry express packages and the messenger in charge of them, for all express companies that apply, on the same terms, unless excused by the fact that so many apply that it is impossible to accommodate all.

Some of these cases coming on appeal from the United States circuit courts, were considered together by the Supreme Court of the United States, and it was there decided, that in the absence of some special statute, there is no law or usage having the force of law, which requires railroad companies to furnish express facilities to all express companies which demand them.'

<sup>1</sup> *Memphis & L. R. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791.

The car space that can be given to the express business on a passenger train is, to a certain extent, limited; and as is well known, that which is to be allotted to a particular carrier must be, in a measure, under its exclusive control. No express company can do a successful business, unless it is at all times reasonably sure of the means it requires for transportation. On important lines one company will at times fill all the space the railroad company can well allow for the business. If this space had to be divided among several companies, there might be occasion when the public would be put to inconvenience by delays which could otherwise be avoided. So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual, when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security.

The inconvenience that would come from allowing more than one express company on a railroad at the same time, was apparently so well understood, both by the express companies and the railroad companies that the three principal express companies,—the Adams, the American, and the United States,—almost immediately on their organization, now some forty years ago, by agreement divided the territory in the United States traversed by railroads among themselves; and since that time each has confined its own operations to the particular roads, which, under this division, have been set apart for its special use. No one of these companies have ever interfered with the other, and each has worked its allotted territory, always extending its lines in the agreed directions as circumstances would permit. At the beginning of the late civil war the Adams Express Company gave up its territory in the southern states to the Southern Company, and since then the Adams and Southern have occupied, under arrangements between themselves, that part of the ground origi-

nally assigned to the Adams alone. In this way, these three or four important and influential companies were able substantially to control, from 1854 until now, all the railway express business in the United States, except upon the Pacific roads and in certain comparatively limited localities. In fact, as was shown some ten years ago, the Adams then occupied 155 railroads, with a mileage of 21,216 miles, the American 200 roads with a mileage of 28,000 miles, and the Southern 95 roads, with a mileage age of 10,000 miles. Through their business arrangements with each other, and with other connecting lines, they have been able for a long time to receive and contract for the delivery of any package committed to their charge at almost any place of importance in the United States and Canada, and even at some places in Europe and the West Indies. They have invested millions of dollars in their business, and have secured public confidence to such a degree that they are trusted unhesitatingly by all who need their services. The good will of their business is of very great value, if they can keep their present facilities for transportation. The longer their lines and the more favorable their connections, the greater will be their own profit and the better their means of serving the public. In making their investments and in extending their business they have undoubtedly relied on securing and keeping favorable railroad transportation, and in this they were encouraged by the apparent willingness of the railroad companies to accommodate them; but the fact still remains that they have never been allowed to do business on any road except under a special contract, and that, as a rule, only one express company has been admitted on a road at the same time.

The simple transportation of property on a railway is but a small percentage—40 per cent—of the express business. The remaining 60 per cent is of business done off the lines of railway, and is of a character not included even by implication in the right to transport passengers and goods, wares and merchandise on a prescribed line. Such service, it has been said, cannot lawfully be required from a railway company.<sup>1</sup>

<sup>1</sup> *American Merchants U. Exp. Co. v. Wolf*, 79 Ill. 430; *American U. Exp. Co. v. Robinson*, 72 Pa. 274; *Thomas v. Boston & P. R. Corp.* 10 Met. 477,

But, although ruling that railroads are not common carriers as to express companies so as to be compelled to transport their matter without any preference or discrimination between such companies, and that the question is admittedly one proper for legislative action, the Supreme Court of the United States is inclined to regard it as the duty of the railroad companies to furnish such facilities to the public and, in stating its rulings on the question of discrimination between express companies, it is said that the obligation of railroad companies either to carry express matter themselves or to allow it to be carried by their trains is, however, a different question.<sup>1</sup> Still it may be said that a statute making it unlawful for any common carrier to give undue or unreasonable preference to any person, company, firm, corporation, or locality, does not require equal facilities to be given to express companies for carrying on business over a railroad, unless it holds itself out as a common carrier of such companies.<sup>1</sup> But in granting the right, the interest of the carrier may be considered. Justice Pratt, in the supreme court, Brooklyn, granted a temporary injunction restraining the New York & New England Railroad Company, and others, from executing and delivering any contract granting express privileges over the lines of the company, to the American Express Company, and from putting that company in possession of any such facilities over the lines of the railroad company. The application for the injunction was made in behalf of a stockholder in the New York & New England Company. In his affidavit, on which the injunction is granted, he alleges that the railroad company rejected an offer which would in all other respects equal that made by the American Express Company, and in addition guaranteed \$22,000 more a year as a mini-

43 Am. Dec. 444; *Witbeck v. Holland*, 45 N. Y. 17, 6 Am. Rep. 23, 55 Barb. 443; *Hoagland v. Hannibal & St. J. R. Co.* 39 Mo. 451; *St. Joseph, H. & St. J. R. Co. v. Saville*, 39 Mo. 460; *People v. Chicago & A. R. Co.* 55 Ill. 95 Am. Dec. 631; *Macon v. Macon & W. R. Co.* 7 Ga. 221; *Abbott v. Baltimore & R. Steam Packet Co.* 1 Md. Ch. 542; *Citizen's Bank v. Nantucket S. B. Co.* 2 Story, 17; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Bland v. Southern Exp. Co.* 1 Hughes, 345; *Knapp v. United States & C. Exp. Co.* 55 N. H. 348; *Whitney v. Merchant's U. Exp. Co.* 104 Mass. 152, 6 Am. Rep. 207; *Palmer v. Holland*, 51 N. Y. 416, 10 Am. Rep. 616; *American Exp. Co. v. Haire*, 21 Ind. 4, 83 Am. Dec. 334.

<sup>1</sup> *Memphis & L. R. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791.

mun compensation for the privileges, and which would make a gain to the New York & New England Company of at least \$110,000 for the proposed five years' contract. The railroad company would also lose certain incidental advantages which would accrue to it from making a contract with the United States Express Company, which had made the larger offer, by reason of its connections with the Reading Company, which directly connects with the New England Company at Hopewell Junction and at Hartford, and with which there now exist traffic contracts. The plaintiff gave a bond of \$5000. By the terms of the contract, the performance of which is thus enjoined, the American Express Company was to have assumed control of the express business over the New York & New England road. Heretofore this business has been done by the Adams Express Company.

A carrier allowing an expressman to occupy a stand at its depot is not required by common law to furnish equal facilities to all persons, nor will a statute be given such a construction in order to bring it within any express theory of public policy.<sup>1</sup>

<sup>1</sup> *Old Colony R. Co. v. Tripp*, 147 Mass. 35; *Com. v. Carey*, 147 Mass. 40 note.

## CHAPTER II.

### LIMITATION OF LIABILITY BY CONTRACT AND BY STATUTE.

- § 10. *The Common Law Liability of Freight Carriers.*
- § 11. *Limitation of Liability by Notice.*
- § 12. *Limitation of Liability in Particular Instances.*
- § 13. *Release of Liability Must Rest upon a Consideration.*
- § 14. *Denial of Right to Contract against Negligence.*
- § 15. *Refusal of United States Courts to Recognize Contracts Releasing Liability for Negligence.*
- § 16. *When Exemption by Contract is Permitted, it Must be Clear and Explicit.*
- § 17. *Statutes Limiting Power of Carrier to Contract against its own Negligence.*
- § 18. *Limitation of Amount of Liability by Statute—Act of Congress.*
- § 19. *Law of Place of Contract of Affreightment.*

#### § 10. *The Common Law Liability of Freight Carriers.*

In pointing out the distinction in liability between carriers of goods and passenger carriers, in § 2, *ante*, something has necessarily been said of the common law liability of the former, and what is now written is in continuation of the discussion pointing out the permitted modifications of such liability. What has been called the general maritime law is enforced in this country and other countries, so far only as it has been adopted by the laws or usages thereof; and no rule of general maritime law (if any exists) concerning the validity of a stipulation authorizing a carrier upon water to contract against his liability for negligence has ever been adopted in the United States or in England or recognized in the admiralty courts of either.<sup>1</sup>

<sup>1</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788; *Rodd v. Heartt* ("The Lottawanna") 88 U. S. 21 Wall. 558, 22 L. ed. 654; *National Steam Nav. Co. v. Dyer* ("The Scotland") 105



But there is not, in fact, any general maritime law recognizing the right of a carrier of goods or passengers by water to stipulate for exemption from all liability for his own negligence. The decisions of courts and opinions of commentators in France, Italy, Germany and Holland, tending to show the existence of such a rule, do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular countries, and it has been said by many jurists that the law of France, at least, was otherwise.<sup>1</sup>

The common law charges the common carrier, whether by land or water, against all events but acts of God, of the king's enemies or of the shipper; so that a common carrier is an insurer against all perils or losses not within the exception. This rule is part of the common law of this country, and it is not a defense to the claim of an owner that a carrier has done the best he could or that the accident causing the loss was unavoidable. He must bring himself clearly within one of these exceptions.<sup>2</sup>

U. S. 24, 26 L. ed. 1001; *The Belgenland v. Jensen*, 114 U. S. 355, 32 L. ed. 152; *The Harrisburg v. Rickards*, 119 U. S. 199, 30 L. ed. 358; *The Hamburg*, 2 Moore, P. C. N. S. 289, 319, Brown & L. Adm. 253, 272; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 6 Best & S. 100, 136; *The Gaetano*, L. R. 7 Prob. Div. 137.

<sup>1</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") *supra*; 4 Goujet & Meyer, Dict. Droit Com. (3d ed.); Voiturier, Nos. 1, 81; 2d Trop- long, Droit Civile, Nos. 894, 910, 942, and other cases cited in *Peninsular & O. Steam Nav. Co. v. Shand*, 3 Moore, P. C. N. S. 272, 278, 285, 286; Mel- lish, L. J., in *Cohen v. Southeastern R. Co.* L. R. 2 Exch. Div. 253.

<sup>2</sup> *Coggs v. Bernard*, 2 Ld. Raym. 909; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127; *Riley v. Horne*, 5 Bing. 217; *The Maria*, 4 Rob. Adm. 348; *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 43, 17 L. ed. 609; *Letchford v. The Golden Eagle*, 17 La. Ann. 9; *Friend v. Woods*, 6 Gratt. 189; *Orange County Bank v. Brown*, 9 Wend. 85, 24 Am. Dec. 129; *Thurman v. Wells, Fargo & Co.* 18 Barb. 500; *Mershon v. Hobensack*, 23 N. J. L. 580; *Thomas v. Boston & P. R. Corp.* 10 Met. 476, 43 Am. Dec. 444; *Crosby v. Fitch*, 12 Conn. 419, 31 Am. Dec. 745; *Lewis v. Ludwick*, 6 Coldw. 368, 98 Am. Dec. 454; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *New Brunswick, S. B. & C. Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Swindler v. Hilliard*, 2 Rich. L. 286, 45 Am. Dec. 732; *Kiff v. Old Colony & N. R. Co.* 117 Mass. 591, 19 Am. Rep. 429; *Eagle v. White*, 6 Whart. 517, 37 Am. Dec. 434; *Smyrl v. Nolon*, 2 Bail. L. 421, 23 Am. Dec. 146; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Powell v. Mills*, 30 Miss. 231, 64 Am. Rep. 158; *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Central R. & Bkg. Co. v. Hines*, 19 Ga. 203; *Daggett v. Shaw*, 3 Mo. 264; *Behnman v. Hammond*, 42 Cal. 227; *Horse v. Oswego & S. R. Co.* 56

A carrier which makes no inquiry as to the value of his baggage of a passenger who uses no device to escape injury is liable for the full value of jewelry and personal ornaments contained therein, unless they are in excess, in quantity or value, of articles usually taken by persons in like positions making like trips.<sup>1</sup>

The rules of the common law are simple and well defined. The carrier was always liable for all losses, except those occasioned by the act of God, or the public enemy. He was an insurer of the property committed to his custody, even against fire and theft or robbery by armed men. This was on grounds of public policy, to prevent conspiracy of the carrier with the thief or trespasser.<sup>2</sup>

Holt, *Ch. J.*, in *Coggs v. Bernard*, 2 Ld. Raym. 918, says: "This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they be safe in their ways of dealing." Lord Mansfield says<sup>3</sup> the carrier was held liable for such loss "to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled. The law presumes against the carrier, unless he shows it was done by the King's enemies, or by such act as could not happen by the intervention of man; as storms, lightning, and tempests . . . It appears from all the cases for a hundred years back that there are events for which the carrier is liable, independent of his contract. By the nature of his contract, he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm; that is, by the common law, a carrier is in the nature of an insurer."

### § 11. *Limitation of Liability by Notice.*

Burrough, *J.*, in *Smith v. Horne*, 8 Taunt. 144, says: "The doctrine of notice was never known until the case of *Forward v.*

Barb. 121; *Turner v. Wilson*, 7 Yerg. 340; *Emery v. Hersey*, 4 Me. 411, 16 Am. Dec. 268; *Boyle v. McLaughlin*, 4 Harr. & J. 291; *Dunseth v. Wade*, 3 Ill. 285.

<sup>1</sup> *Bonner v. Blum* (Tex. Civ. App.) Jan. 25, 1894.

<sup>2</sup> *Hartwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463.

<sup>3</sup> *Forward v. Pittard*, 1 T. R. 27.

*Pittard*," from which we quote the language of Lord Mansfield, which he says he argued many years before. An examination of that case fails to show any such limitation, or to make any reference to the subject of notice. The doctrine seems first to have been recognized that the liability of the carrier could be limited by a special contract and notice brought home to the party in 1804,<sup>1</sup> by Lord Ellenborough, though the doctrine was expressly denied by Lord Kenyon in 1793, *Hide v. Trent & M. Nav. Proprs.* 1 Esp. 36, in which he says: "Where a man is bound to any duty, and chargeable to a certain extent by the operation of law, in such case he cannot, by any act of his own, discharge himself." And again referring to the common carrier, he says: "They cannot discharge themselves by any act of their own, as by giving notice, for example, to that effect." The doctrine, however, announced by Lord Ellenborough in *Nicholson v. Willan*, seems to have subsequently obtained, and to have been carried so far as to allow the common carrier to cast off all liability whatsoever. And in *Maving v. Todd*, 1 Stark. 72, the defendant carrier having given notice that "he would not be responsible for loss by fire." Lord Ellenborough nonsuited the plaintiff; remarking, however, that "if this action had been brought twenty years ago, the defendant would have been liable since by the common law a carrier is liable in all cases except two—where the loss is occasioned by the act of God, or the King's enemies using an overwhelming force which persons with ordinary means of resistance cannot guard against"—thus showing the departure that the courts had made in so short a period.

But liability of a steamship company for baggage is not affected by a limitation of a paper given a passenger when he is already at sea and powerless to repudiate the pretended contract.<sup>2</sup>

Judge Bronson in *Hollister v. Nowlen*, 19 Wend. 234-242, 32 Am. Dec. 455, after reviewing the common law decisions, and referring to the innovation made by Lord Ellenborough upon the doctrine of notice, says that the doctrine (referring to the decis-

<sup>1</sup> *Nicholson v. Willan*, 5 East, 507.

<sup>2</sup> *Lechowitz v. Hamburg-American Packet Co.* 8 Misc. 213.

ion of Lord Ellenborough, *supra*) in question was not received in Westminster Hall without much doubt; and although it ultimately obtained something like a firm footing, many of the English judges have expressed their regret that it was ever sanctioned by the courts. Departing, as it did, from the simplicity and certainty of the common law rule, it proved one of the most fruitful sources of legal controversy which has existed in modern times. When it was once settled that a carrier might restrict his liability by a notice brought home to his employer, a multitude of questions sprung up in the courts which no human foresight could have anticipated. Each carrier adopted such a form of notice as he thought best calculated to shield himself from responsibility without the loss of employment, and the legal effect of each particular form of notice could only be settled by judicial decision. Whether one who had given notice that he would not be answerable for goods beyond a certain value, unless specially entered and paid for, was liable in case of loss to the extent of the value mentioned in the notice, or was discharged altogether; whether, notwithstanding the notice, he was liable for a loss by negligence, and, if so, what degree of negligence would charge him; what should be sufficient evidence that notice came to the knowledge of the employer; whether it should be left to the jury to presume that he saw it in a newspaper which he was accustomed to read, or observed it posted up in the office where the carrier transacted his business; and, then, whether it was printed in large or small letters, and whether the owner went himself or sent his servant with the goods, and whether the servant could read—these, and many other questions were debated in the courts while the public suffered an almost incalculable injury in consequence of the doubt and uncertainty which hung over this important branch of the law. See 1 Bell, Com. 474. After years of litigation, Parliament interfered, and relieved both the courts and the public, by substantially reasserting the rule of the common law. The Statute of 1 Wm. IV., chap. 68, among other things enacted: “No public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit, or in any wise affect, the liability at common law of any

carriers, but that all and every such carrier shall be liable as at common law to answer for the loss or injury of the property, any public notice or declaration by them made and given contrary thereto, or in any wise limiting such liability, notwithstanding." It would seem, then, that the common law of England, as it existed up to the time of our Revolution, did not permit a carrier to limit his liability by notice. Under the Act of Parliament, requiring that stipulations exempting the common carrier from his common law liability must be reasonable to be valid, the English courts have held that stipulations which would have the effect of releasing the common carrier from loss caused by negligence were unreasonable and void *in toto*, leaving such common carrier under his full common law liability.<sup>1</sup>

If, after a trial of thirty years, the people of Great Britain, whose interests and pursuits are not very dissimilar to our own, have condemned the whole doctrine of limiting the carrier's liability by a notice; if after a long course of legal controversy they have retraced their steps, and returned to the simplicity and certainty of the common law rule—we surely ought to profit by their experience, and should hesitate long before we sanction a practice which not only leads to doubt and uncertainty concerning the rights and duties of the parties, but which encourages negligence, and opens a wide door to fraud.

The question in *Hollister v. Nowlen*, from which this quotation is made, was one of notice—whether the carrier by general notice could limit his liability for the luggage of the passenger; and in discussing this question of notice the learned judge further uses the following pertinent language: "The argument is that where a party delivers goods to be carried, after seeing a notice that the carrier intends to limit his responsibility, his assent to the terms of the notice may be implied. But this argument entirely overlooks a very important consideration. Notwithstanding the notice, the owner has a right to insist that the carrier shall receive the goods subject to all the responsibilities incident to his employment. If the delivery of goods under such

<sup>1</sup> *McManus v. Lancashire & Y. R. Co.* 4 Hurlst. & N. 327-349; *Moore v. Great Northern R. Co.* L. R. 10 Ir. Ch. Div. 95.

circumstances authorizes an implication of any kind, the presumption is as strong to say the least, that the owner intended to insist on his legal rights, as it is that he was willing to yield to the wishes of the carrier. If a coat be ordered from a mechanic after he has given the customer notice that he will not furnish the article at a less price than \$100, the assent of the customer to pay that sum, though it be double the value, may perhaps be implied; but if the mechanic had been under a legal obligation, not only to furnish the coat, but to do so at a reasonable price, no such implication could arise." And, referring to the common law, he says that "the doctrine that a carrier may limit his responsibility by a notice was wholly unknown to the common law at the time of our Revolution. It has never been received in this, nor so far as I have observed in any of the other states."<sup>1</sup>

This subject received also, at the same time, a very careful consideration in *Cole v. Goodwin*, 19 Wend. 251, 23 Am. Dec. 470, in which the carrier sought to avoid his liability for a trunk of the passenger by notice brought home to him that "all baggage is at the risk of the owner."

Judge Cowen, after a very elaborate review of all the common law decisions, announced his conclusion as follows: "I therefore think the defendants in the case at bar must take the consequences of their obligation as common carriers, notwithstanding the notice to the plaintiff. Admitting that the plaintiff acceded in the clearest manner to the proposition in the notice that his baggage should be carried on the terms mentioned, I think the contract thus made was void on his part, as contrary to the plainest principles of public policy. In thus holding, we follow the law as it is expressly admitted by the English judges to have stood at the period when our ancestors declared themselves independent; and, while we thus fulfill our constitutional duty, we are not, like Westminster Hall, obliged to lament while we enforce the law."

The doctrine of these cases was extended in *Gould v. Hill*, 2 Hill, 623, in which a majority of the court held that "common

<sup>1</sup> *Hollister v. Nowlen*, 19 Wend. 248, 32 Am. Dec. 455.

carriers cannot limit their liability or evade the consequences of a breach of their legal duties as such, by an express agreement or special acceptance of the goods to be transported." In *Moses v. Boston & M. R. Co.* 24 N. H. 90, 55 Am. Dec. 222, the court adhere to the rule that the legal responsibility of a common carrier cannot be discharged by a public notice.<sup>1</sup>

## § 12. *Limitation of Liability in Particular Instances.*

The court of appeals of New York<sup>2</sup> denies the doctrine of *Gould v. Hill*, 2 Hill, 623, and says: "That a carrier may, by express contract, restrict his common law liability, is now a well established rule of law;" citing English and American cases. The case of *Dorr v. New Jersey Steam Nav. Co.* was one of carriage of merchandise in which the carrier sought, by notice contained in the bill of lading, to limit its liability as to fire, accidents, etc., holding itself liable only "for ordinary care and diligence."<sup>3</sup> And the validity of an express contract between the owner of goods and a carrier, limiting the general responsibility of the latter, is, in some courts, recognized.<sup>4</sup> A special contract between the owner of goods and a common carrier, limiting the strict common law liability of the latter, has been held valid.<sup>5</sup> But without an express contract the law gov-

<sup>1</sup> See also *Jones v. Voorhees*, 10 Ohio, 145; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Wyld v. Pickford*, 8 Mees. & W. 443; *Hinton v. Dibbin*, 2 Q. B. 646. See also chapter V. § 34.

<sup>2</sup> *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 125; affirming the doctrine of *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, and *Cole v. Goodwin*, 19 Wend. 251, 32 Am. Dec. 470.

<sup>3</sup> See also *Parsons v. Monteath*, 13 Barb. 353; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *Austin v. Manchester, S. & L. R. Co.* 11 Eng. L. & Eq. 506; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 494.

<sup>4</sup> *Kimball v. Rutland & B. R. Co.* 26 Vt. 256, 62 Am. Dec. 567; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577; *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473; *Reno v. Hogan*, 12 B. Mon. 63, 54 Am. Dec. 513; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *American Exp. Co. v. Sands*, 55 Pa. 140; *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Fulkenau v. Furgo*, 55 N. Y. 643; *Walker v. New York & N. M. R. Co.* 3 Car. & K. 279; *Slim v. Great Northern R. Co.* 26 Eng. L. & Eq. 297; *Crouch v. London & N. W. R. Co.* 14 C. B. 297.

<sup>5</sup> *Davidson v. Graham*, 2 Ohio St. 131; *Nicholson v. Willan*, 5 East, 507; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Dercort v. Loomer*, 21 Conn. 246.

erning common carriers both in England and America, is to-day as substantially as laid down by Lord Holt in the year 1703, that "The law charges this person, thus intrusted to carry goods, against all events but the acts of God and the public enemy."<sup>1</sup> As has been shown by the common law of England and America before the Declaration of Independence, recognized by the weight of English authorities for half a century afterwards, and upheld by decisions of the highest courts of many states of the Union, common carriers could not stipulate for immunity for their own or their servant's negligence. However particular such a contract might be in its terms, it could only have the effect of reducing the liability of a common carrier to that of a private carrier for hire, who is bound to the use of ordinary care.<sup>2</sup>

The English Railway & Canal Traffic Act of 1854 (Stat. 17 & 18 Vict. chap. 31, § 7) declaring void all notices and conditions made by those classes of common carriers, except such as should be held by the court or judge before whom the case should be tried to be just and reasonable, is to a substantial degree a return to the rule of the common law.<sup>3</sup>

To protect themselves against the hardship of a rule of law which requires them to do a particular thing, whether or not that thing be possible to accomplish by the use of all diligence and every agency available to them, common carriers have adopted the custom of receiving and transporting freight under special contract. They are, with exceptions, as in New York and West Virginia,<sup>4</sup> liable in any case for damages resulting from their negligence, under the decided weight of authority.<sup>5</sup> But they

<sup>1</sup> 19 Cent. L. J. 164; *Wabash, St. L. & P. R. Co. v. Black*, 11 Ill. App. 465; *Darson v. St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Moore v. Great Northern R. Co.* L. R. 10 Ir. Ch. Div. 95.

<sup>2</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Lyon v. Mells*, 5 East, 428; *Wyld v. Pickford*, 8 Mees. & W. 442; *Hinton v. Dibbin*, 2 Q. B. 646; *Thomas v. Boston & P. R. Corp.* 10 Met. 472, 43 Am. Dec. 444; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526; *Powell v. Pennsylvania R. Co.* 32 Pa. 414, 75 Am. Dec. 564; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490.

<sup>3</sup> *Brown v. Manchester, S. & L. R. Co.* L. R. 10 Q. B. Div. 230; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 493; *McAndrews v. Electric Teleg. Co.* 33 Eng. L. & Eq. 180, 185.

<sup>4</sup> *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, 36 W. Va. 524.

<sup>5</sup> *Laing v. Colder*, 8 Pa. 479, 49 Am. Dec. 533; *Cumden & A. R. Co. v. Baldauf*,



are not liable, under such contract, for damages resulting from delay occasioned by any cause beyond their power to control by the use of all means reasonably available to them.<sup>1</sup> This exemption from liability for damages so occasioned is available to the carrier whether the contract of shipment be interstate, or whether it is to be performed wholly within the state.<sup>2</sup>

In the language of Mr. Justice Strong, in the opinion of the Supreme Court of the United States in the case of *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556: "Notwithstanding the great rigor with which courts of law have always enforced the obligations assumed by common carriers, and notwithstanding the reluctance with which modifications of that responsibility imposed upon them by public policy have been allowed, it is undoubtedly true that special contracts with their employers limiting their liability are recognized as valid if, in the judgment of the court, they are just and reasonable—if they are not in conflict with sound legal policy."<sup>3</sup>

16 Pa. 67, 55 Am. Dec. 481; *Goldcy v. Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Furnham v. Camden & A. R. Co.* 55 Pa. 53; *Empire Transp. Co. v. Wamsutta Oil R. & M. R. Co.* 63 Pa. 14, 3 Am. Rep. 515; *Knowlton v. Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 395; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Dec. 719; *School District in Medfield v. Boston, H. & E. R. Co.* 102 Mass. 552, 3 Am. Rep. 502; *Adams Exp. Co. v. Stettiners*, 61 Ill. 184, 14 Am. Rep. 57; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271; *Ketchum v. American Merchants U. Exp. Co.* 52 Mo. 390; *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 302; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Berry v. Cooper*, 28 Ga. 543; *Swindler v. Hilliard*, 2 Rich. L. 286, 45 Am. Dec. 732; *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 469.

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Levi*, 76 Tex. 337; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 475, 6 Am. & Eng. R. Cas. 391; *Bartlett v. Pittsburg, C. & St. L. R. Co.* 94 Ind. 281, 18 Am. & Eng. R. Cas. 549.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89.

<sup>3</sup> This opinion, last above cited, was delivered in October, 1874, and scarcely more than substantially followed the earlier ones of *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170, and *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; see *Louisville & N. R. Co. v. Gilbert*, 7 L. K. A. 162, 88 Tenn. 430.

### § 13. *Release of Liability Must Rest upon a Consideration.*

Where a distinct option is given, under which the consignor may ship his goods under the ordinary liability of the carrier, or he may secure a cheaper rate by waiving all liability whatever, except for willful misconduct, the contract in England has been held effective.<sup>1</sup> So, in England, a contract proposed by a carrier, which seeks to release all liability, to the exclusion of any contract at a different rate, which will reserve the consignor's rights, has been held to be unreasonable.<sup>2</sup>

In *Brown v. Manchester, S. & L. R. Co.*, it was said by Brett and Bagallay, *L. JJ.*, that the condition extending to willful misconduct and exempting from all liability whatever, cannot be reasonable, and in *Ashenden v. London, B. & S. C. R. Co.*, 42 L. T. N. S. 586, it was held that the giving of an option would not render such a contract valid. By the carrier's act of 1830, Parliament declared that carriers should not be liable for loss or injury to certain goods above the value of ten pounds, unless their value be declared and an increased charge paid. These articles included gold or silver in coin, or manufactured or unmanufactured state bank notes, title deed, engravings, glass, china and silks, whether contained in any parcel, either to be carried for hire, or upon the person of any passenger. The act applies only where the loss takes place on land.<sup>3</sup>

The statement that a common carrier may, by contract, limit its common law liability except where it is guilty of negligence has been made in a multitude of cases, and this has been repeatedly declared to be a well established doctrine. But a careful exami-

<sup>1</sup> *Brown v. Manchester, S. & L. R. Co.* 10 Q. B. Div. 250, L. R. 8 App. Cas. 703; *Lewis v. Great Western R. Co.* L. R. 3 Q. B. Div. 195; *Simons v. Great Western R. Co.* 26 L. J. C. P. 25.

<sup>2</sup> *Brown v. Manchester, S. & L. R. Co.* *supra*; *McManus v. Lancashire & Y. R. Co.* 28 L. J. Exch. 353; *Gregory v. West Midland Co.* 33 L. J. Exch. 155; *Allday v. Great Western R. Co.* 34 L. J. Q. B. 5, 5 Best. & S. 903; *McCance v. London & N. W. R. Co.* 31 L. J. Exch. 65; *Rooth v. North Eastern R. Co.* L. R. 2 Exch. 173, 36 L. J. Exch. 83; *Peck v. North Staffordshire R. Co.* 32 L. J. Q. B. 241.

<sup>3</sup> *Le Contour v. London & S. W. R. Co.* 35 L. J. Q. B. 40, L. R. 1 Q. B. 54; *Baxendale v. Great Eastern R. Co.* 4 Q. B. 244, 38 L. J. Q. B. 137.

nation of the numerous cases in which this doctrine has been laid down shows that in them the question of right to refuse the shipper an option to pay to have his goods carried without any limitation of the carrier's liability at reasonable rates was not presented.<sup>1</sup>

A limitation of liability in the bill of lading will not control where the damage is an effect of the carrier's negligence and where it does not appear that the limitation was in consideration of a lower rate of freight.<sup>2</sup> Or a carrier does not prove this fact on the trial.<sup>3</sup> A carrier cannot wholly exempt himself from liability for negligence, but may, by special contract fairly made with the shipper and signed by him in consideration of a reduced freight charge, restrict his liability for loss, even through his prima facie negligence, to a valuation fixed by the agreement.<sup>4</sup> A limitation of the liability of a carrier, to a specified amount, for property carried at a reduced rate, is valid.<sup>5</sup>

It is not every special contract that is effective. To be valid, it must be fairly obtained, founded upon a consideration, and be just and reasonable.<sup>6</sup> The shipper should have the alternative of

<sup>1</sup> Among the many such cases are the following: *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 125; *Fibel v. Livingston*, 64 Barb. 179; *Parsons v. Monteath*, 13 Barb. 353; *Stoddard v. Long Island R. Co.* 5 Sandf. 180; *Moore v. Evans*, 14 Barb. 524; *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Van Schaack v. Northern Transp. Co.* 3 Biss. 394; *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326; *Adams Exp. Co. v. Fendrick*, 38 Ind. 150; *Cooper v. Berry*, 21 Ga. 526; *Kallman v. United States Exp. Co.* 3 Kan. 205; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Rep. 285; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556.

<sup>2</sup> *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73.

<sup>3</sup> *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 9 Ry. Corp. L. J. 385.

<sup>4</sup> *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, 36 W. Va. 524.

<sup>5</sup> *Zimmer v. New York Cent. & H. R. R. Co.* 42 N. Y. S. R. 63; *Muser v. Holland*, 17 Blatchf. 412; *Earnest v. Express Co.* 1 Woods, 573; *Hopkins v. Westcott*, 6 Blatchf. 64; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 368; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538.

<sup>6</sup> *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hurt v. Pennsylvania R. Co.* 112 U. S. 338, 28 L. ed. 720; *Marr v. Western U. Teleg. Co.* 85 Tenn. 542; *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 397.

shipping under the common law liability, or a less or restricted liability, at his option.<sup>1</sup> A condition to be reasonable must be coupled with compensating advantages. It may not contravene public policy.<sup>2</sup> It must be fairly obtained.<sup>3</sup> In numerous other cases where a limitation of liability by contract is held to be allowable, the report shows that there was, in fact, a consideration therefor in a reduction of rates, although this was not expressly mentioned by the court as a reason for the decision.<sup>4</sup>

The English doctrine, until it was modified by an act of Parliament, is generally said to be that the carrier may limit his liability to any extent by contract; but that the English decisions to this effect do not mean to free the carrier from liability to carry the goods without limitation of liability on reasonable terms, clearly appears by examination of them. Thus, in *Harris v. Packwood*, 3 Taunt. 271, in which a special acceptance limiting liability was held allowable, the court says that carriers "will not be insurers unless paid according to value," so in *Wylde v. Pickford*, 8 Mees. & W. 443, it is declared that a carrier is entitled by common law to insist upon the full price of carriage, and that he may, if such price be not paid, refuse to carry upon the terms imposed by the common law and insist upon his own. A common carrier is bound to transport for a reasonable remuneration and if he offers to do so and at the same time offers to carry on condition that he shall assume no liability, and holds forth, as an inducement, a reduction of price, or some additional advantage which he does not give to those who employ him with a common law liability, the conditions

<sup>1</sup> *Peck v. North Staffordshire R. Co.* 10 H. L. Cas. 473; *Louisville & N. R. Co. v. Gilbert*, *supra*; *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703; *Beal v. South Devon R.* 3 Hurlst. & C. 337; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788.

<sup>2</sup> *Clayton v. Corby*, 2 Q. B. 819.

<sup>3</sup> *Roth v. North Eastern R. Co.* L. R. 2 Exch. 173.

<sup>4</sup> *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *Illinois Cent. R. Co. v. Morrison*, 19 Ill. 136; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Bartlett v. Pittsburg, C. & St. L. R. Co.* 94 Ind. 281; *Squire v. New York Cent. R. Co.* 93 Mass. 239, 93 Am. Dec. 162; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453; *Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *Loire v. Booth*, 13 Price, 329; *Morrison v. Philipps & C. Constr. R. Co.* 44 Wis. 405, 28 Am. Rep. 599; *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849, 86 Va. 481; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 9 Ry. & Corp. L. J. 385.

thus offered are reasonable.<sup>1</sup> Where the shipper knew that the carrier had two rates, according to the service desired, and he chose the lower terms, he must stand to his bargain.<sup>2</sup>

The other English cases in which special acceptances, as they are termed, limiting liability, are upheld, are not opposed to this doctrine; but decisions allowing a restriction of the carrier's liability are clearly to be construed as permitting it only in case of a reduction of rates. So, in many American cases where the doctrine is not clearly stated, it is fairly implied. Thus, in *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527, 57 Ark. 112, it was declared that a carrier cannot, by special contract, limit its common law liability for losses not occasioned by negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction, even if he makes the special contract without objection or demand for a different one, and in *Farnham v. Camden & A. R. Co.* 55 Pa. 53, in which a limitation of liability was upheld, the court says: "We are to presume, of course, that the charge for transportation was in proportion to the risk." And in *Judson v. Western R. Corp.* 6 Allen, 486, 83 Am. Dec. 646, the court says: "The carrier has not the option to accept or refuse the carriage of the goods at his pleasure, but the person seeking to have them transported can choose whether they shall be carried without any restriction of the carrier's duty as prescribed by law." And in *New York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170, the court says the carrier cannot "coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused," but that he may "fix a rate of charges proportionate to the magnitude of the risks." Likewise in *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285, the court says the carrier is "still regarded as exercising a public employment and incapable by any act of his own of limiting or evading the responsibility which the law attaches to its exercise."

In a few cases the courts have still more clearly and explicitly

<sup>1</sup> *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 483.

<sup>2</sup> *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703.

announced the doctrine which may fairly be regarded as underlying all the decisions, even those in which the general statement of the right of a carrier to limit his liability may seem to deny it. Thus a condition in a bill of lading which limits the carrier's liability is reasonable if coupled with compensating advantages to the shipper, and the latter has the alternative of getting rid of the condition by paying a reasonably higher freight rate.<sup>1</sup> A stipulation by a carrier limiting its liability to a stated sum unless the value of the property is disclosed will not relieve the carrier from liability, although the shipper refused to state the amount, where there was no consideration for the stipulation by reduction of charges or otherwise.<sup>2</sup>

In *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210, it is expressly declared that a carrier cannot limit his liability unless the contract is freely and fairly made, and that he cannot exact as a condition precedent to carrying goods that the shipper shall sign a contract limiting or changing the common law liability. Also that if the carrier has two rates, one for the common law liability and the other for the special contract, the shipper must have real freedom in making his selection. So in *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208, it is said by Judge Cooley in the opinion of the court that "subject to reasonable regulations every man has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common law liability." Again, in *Olwell v. Adams Exp. Co.* 1 Cent. L. J. 186, it is said: "A stipulation limiting the common law liability of the carrier in order to be binding must be based on a special consideration such as a lower rate of freight or something equivalent." This is reaffirmed in *Dillard v. Louisville & N. R. Co.* 2 Lea, 288, deciding that a lower rate of freight or something equivalent thereto will constitute a sufficient consideration for a limitation of liability. So is the decision in *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430, that a "fire clause in a bill of lading

<sup>1</sup> *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653; *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849, 86 Va. 481.

<sup>2</sup> *Conover v. Pacific Exp. Co.* 40 Mo. App. 31.

exempting the carrier from liability for loss by fire is not valid where transportation under the rules of the common law is not offered as an alternative and no reduction of rates is made as a consideration for the exemption." The same principle in substance is announced in *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127, holding that a common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight.

Unquestionably there must be some consideration for a release by the shipper, of the carrier from liability which rests upon it under the common law. The rule has been stated, that where there is no evidence that a consideration was not given for the stipulation, a consideration expressed is sufficient to support the contract; the court presuming that the carrier probably had rates of charges proportioned to the risk they assumed from the nature of the goods carried, and that the exception must necessarily have effected the compensation demanded.<sup>1</sup>

A carrier need not specifically tender a contract omitting the limited liability clause, in order to avail itself, in an action for damages to stock during transportation, of the defense that it was willing and ready to execute a contract with the shipper upon terms reasonable to the latter, where it sets up a contract limiting its liability to an agreed valuation, as the shipper should demand such contract if it prefers it.<sup>2</sup>

By statute in some places a limitation of a carrier's liability by contract is prohibited. Thus in Texas, by Rev. Stat. art. 278, and in several other states by similar provisions. And in England the Act of Parliament allows only such limitations as shall be found by the courts to be "just and reasonable." The same doctrine which seems clearly to underlie the general current of decisions, appears in cases as to the limitation of the amount of liability, as to which, see §§ 50, 51.<sup>3</sup>

<sup>1</sup> *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Nelson v. Hudson River R. Co.* 48 N. Y. 498.

<sup>2</sup> *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17, 9 Ry. & Corp. L. J. 385.

<sup>3</sup> *Pacific Exp. Co. v. Foley*, 12 L. R. A. 799, 46 Kan. 457; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55.

As a general rule, and in the absence of fraud or imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents and though its contents are ever so valuable, if he does not make a special acceptance. But if the shipper is guilty of fraud or imposition, he destroys his claim to indemnity.<sup>1</sup>

Where the contract of carriage signed by the shipper is fairly made, agreeing on a valuation with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.<sup>2</sup>

#### § 14. *Denial of Right to Contract Against Negligence.*

While it is true that in some of the states the carrier may contract against its own negligence, as appears by the review of the authorities in Ray on Negligence of Imposed Duties, Passenger Carriers, § 80, yet the ancient rule is recognized in almost all of the courts that a carrier cannot contract against its own want of diligence.<sup>3</sup> While it is admitted in some of the states that a carrier may

<sup>1</sup> *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, citing 2 Kent, Com. 603; *Relf v. Rapp*, 3 Watts & S. 21, 37 Am. Dec. 528; *Dunlap v. International S. B. Co.* 98 Mass. 317; *New York Cent. & H. R. R. Co. v. Frahoff*, 100 U. S. 24, 25 L. ed. 531; *Gibbon v. Paynton*, 4 Burr. 2298; *Batson v. Donovan*, 4 Barn. & Ald. 21.

<sup>2</sup> *Muser v. Holland*, 17 Blatchf. 412; *Earnest v. Express Co.* 1 Woods, 573; *Hopkins v. Westcott*, 6 Blatchf. 64; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 368; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538.

<sup>3</sup> *Boehl v. Chicago, M. & St. P. R. Co.* 14 Minn. 191; *Chicago & N. W. R. Co. v. Chapman*, 8 L. R. A. 508, 133 Ill. 96; *Welch v. Boston & A. R. Co.* 41 Conn. 333; *Camp v. Hartford & N. Y. S. B. Co.* 43 Conn. 333; *School Dist. in Medfield v. Boston, H. & E. R. Co.* 102 Mass. 552, 3 Am. Rep. 502; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490; *Rhodes v. Louisville & N. R. Co.* 9 Bush. 688.



stipulate upon a sufficient consideration for exemption from liability for the ordinary negligence of its servants—yet, this exemption will not be extended to an act of positive misfeasance. It need not necessarily be intentional wrong-doing, to prevent its excusing from responsibility, but it must be an affirmative act, not merely ordinary neglect in the course of the bailment, nor the omission of ordinary care in the safe keeping and carriage of the goods.<sup>1</sup> A carrier may, by special contract, free himself from many common law liabilities, although not from his own fraud or negligence.<sup>2</sup> A common carrier is an insurer of property, and his liability is not limited by the fact that the property was not loaded by the owner, or that the owner accompanies it.<sup>3</sup>

From the cases from the various state courts except, perhaps, in New York<sup>4</sup> and West Virginia, it would seem that a common carrier cannot be exempted, by contract, from liability for loss of goods from his own negligence or that of his servants; he can limit his liability only as an insurer of transportation as to every cause of injury except that arising from his own want of care,<sup>5</sup> and become thus subject to the laws of bailment only.<sup>6</sup>

The apparent contradiction of this doctrine, as contained in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, which *Grogan v. Adams Exp. Co.* 114 Pa. 523, refused to follow is referable to the fact that the slipper in that case was estopped by his own act. A common carrier cannot contract against liability from loss from his own ordinary negligence. Such a condition is void as against public policy.<sup>7</sup> It cannot, by special contract, limit its liability so as to exempt it from responsibility for losses occasioned by its negligence.<sup>8</sup>

<sup>1</sup> *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608.

<sup>2</sup> *Terre Haute & I. R. Co. v. Sherwood*, 17 L. R. A. 339, 132 Ind. 129; *Galveston, H. & S. A. R. Co. v. Parsley* (Tex. Civ. App.) Jan. 3, 1894.

<sup>3</sup> *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

<sup>4</sup> *Spinetti v. Atlas S. S. Co.* 80 N. Y. 71, 36 Am. Rep. 579; *Cragin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Poucher v. New York Cent. R. Co.* 49 N. Y. 263.

<sup>5</sup> *Furnham v. Camden & A. R. Co.* 55 Pa. 53; *Pennsylvania R. Co. v. Railroad*, 119 Pa. 577.

<sup>6</sup> *American Exp. Co. v. Sands*, 55 Pa. 140.

<sup>7</sup> *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394.

<sup>8</sup> *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55.

The right of a carrier to limit its common law liability by special contract does not extend to acts which result from its negligence or the negligence of its employes.<sup>1</sup> It may, by special contract, limit its liability to the owner of stock or goods, so long as the limitation does not relate to its liability for negligence or misconduct.<sup>2</sup> Nor can it limit its liability for the negligence of its employes by stipulating that those furnished to assist the shipper in loading and unloading freight shall be the employes of the latter.<sup>3</sup> A carrier cannot limit its liability for its own negligence by contract, either as to the right or the amount of recovery.<sup>4</sup> Nor can a common carrier in Colorado provide by contract against liability for its negligence.<sup>5</sup> It cannot restrict its liability for damages for its own negligence to less than the true value of the property by a provision that in case of loss the value at the place of shipment shall be the measure of damages;<sup>6</sup> and a stipulation limiting the liability of a common carrier for the loss of goods delivered to it for transportation is void where it does not provide for full payment in case of its negligence.<sup>7</sup> An express stipulation by any common carrier for hire, in a contract of carriage, that he shall be exempt from liability for losses caused by the negligence of himself or his servants, is unreasonable and contrary to public policy, and consequently void.<sup>8</sup> To be valid, a contract restricting a carrier's liability must be fairly obtained, just and reasonable.<sup>9</sup> The authorities almost universally concede the carrier's liability for losses accruing through his gross negligence under a contract that property shall be transported at

<sup>1</sup> *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Temple*, 13 L. R. A. 362, 47 Kan. 7.

<sup>3</sup> *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348.

<sup>4</sup> *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524.

<sup>5</sup> *Union Pac. R. Co. v. Ruiney* (Colo.) Dec. 4, 1893.

<sup>6</sup> *Fort Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104.

<sup>7</sup> *Galveston, H. & S. A. R. Co. v. Bull*, 80 Tex. 602.

<sup>8</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788.

<sup>9</sup> *Louisville & M. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

the owner's risk,<sup>1</sup> and unless in the excepted courts a common carrier cannot, even by express contract, exempt itself from liability from gross negligence or willful misconduct.<sup>2</sup>

### § 15. *Refusal of Federal Courts to Recognize Contracts Releasing Liability for Negligence.*

On the question of the right of a carrier of goods or passengers by land or water, to stipulate for exemption from all liability for his own negligence, as in any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of citizenship of the parties in an action at law, of which the courts of the state have concurrent jurisdiction, upon a contract made and to be performed within the state.<sup>3</sup> Upon a New York contract exempting a carrier from liability for negligence, the Circuit Court of the United States for the New York District is not bound to hold the exemption valid because of the decisions of the New York courts.<sup>4</sup> A stipulation in a charter or bill of lading for the adoption of the law of a foreign country, by which a carrier may be exempted from responsibility for negligence, is invalid in United States courts.<sup>5</sup> And a provision of a bill of lading exempting the ship from liability for damage caused by negligence will not be enforced by the United States courts, although the bill of lading

<sup>1</sup> *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Moore v. Evans*, 14 Barb. 524; *Wells v. Steam Nav. Co.* 8 N. Y. 380; *French v. Buffalo, N. Y. & E. R. Co.* 4 Keyes, 113; *Higgins v. New Orleans, M. & O. R. Co.* 28 La. Ann. 133; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Arnold v. Illinois Cent. R. Co.* 83 Ill. 273, 25 Am. Rep. 386.

<sup>2</sup> *Chicago & N. W. R. Co. v. Chapman*, 8 L. R. A. 508, 133 Ill. 96.

<sup>3</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788; *Myrick v. Michigan Cent. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 571, 10 L. ed. 1044, 1073; *Brooklyn City & N. R. Co. v. National Bank of New York*, 102 U. S. 14, 26 L. ed. 61; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 513; *Bucher v. Cheshire R. Co.* 125 Mass. 555, 583, 31 L. ed. 795, 798.

<sup>4</sup> *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

<sup>5</sup> *The Energia*, 56 Fed. Rep. 124.

provides that the contract shall be governed by the laws of the flag of the ship, and by such law such provision is valid.<sup>1</sup>

§ 16. *When Exemption by Contract Permitted, Exception Must be Clear and Explicit.*

There is no public policy which prevents the carrier from assuming enlarged liabilities; indeed he may by contract become an absolute insurer. But, the same rule applies when the liability of the carrier is extended, that is enforced where he seeks to restrict his common law liability. There must be shown, in either case, a distinct contract expressed in clear and unmistakable terms.<sup>2</sup> There is no public policy, requiring exemptions from legal liability on the part of carriers to be sustained as far as possible.<sup>3</sup> The liability of common carriers as such is properly regulated by law and not by the contract of the carrier. Some courts, notably those of New York, hold as the English courts had come to hold before the Act of Parliament, that the common carrier may stipulate for total exemption from his common law liability as a carrier, but the New York court has expressed its regret over the adoption of that rule<sup>4</sup> and await the consideration of the legislature to remedy it. The validity of a contract exempting a carrier from liability for negligence of its servants does not depend alone upon its granting reduced rates in consideration thereof; but its agreement to perform services respecting the goods is sufficient consideration therefor. A carrier is exempted from liability for the negligent stowage of oil in the same compartment with furs, in consequence of which the latter are damaged by a clause of the bill of lading exempting it from liability for "injury from corruption, frost, decay, stowage . . . or from any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the ship's owners."<sup>5</sup>

<sup>1</sup> *Lewisohn v. National SS. Co.* 56 Fed. Rep. 602.

<sup>2</sup> *Price v. Hartshorn*, 44 N. Y. 94, 4 Am. Rep. 645; *Gage v. Tirrell*, 9 Allen, 299.

<sup>3</sup> *Camp v. Hartford & N. Y. S. B. Co.* 43 Conn. 340.

<sup>4</sup> 71 N. Y. 185, 27 Am. Rep. 28.

<sup>5</sup> *Rubens v. Ludgate Hill SS. Co.* 48 N. Y. S. R. 733.

Such courts require the carrier, if he desires to be exempt from the results of his negligence, so to state in the contract, "*ipsissima verbis*."<sup>1</sup> Every limitation of the responsibility of a common carrier should be expressed in each case in unequivocal terms.<sup>2</sup> A shipping contract, though made at a reduced rate and providing for the exemption of the carrier from liability for its negligence, will not exempt it from any kind or sort of negligence not specifically and expressly stated in the contract.<sup>3</sup> A stipulation in a bill of lading for the shipment of money over a railroad and steamship line, that it is to be conveyed "upon said steamship" with certain limitations of liability, does not apply to its conveyance over the railroad.<sup>4</sup>

Where general terms of exemption are employed, the special risks thereafter enumerated and excepted will limit the general exceptions to the class of risks especially mentioned, if such a construction can be reasonably placed upon the language employed.<sup>5</sup> If a common carrier may limit his liability by express contract, the limitation must be reasonable in itself, and not such as to operate as a snare or fraud upon the public.<sup>6</sup>

Although a carrier of freight and passengers in the state of New York may lawfully stipulate for exemption from liability for negligence of itself and servants when supported by a good consideration, such as carrying the goods at the lowest rate made for this class of freight,<sup>7</sup> such stipulation is to be strictly construed, and the exemption must be expressed in terms; and if general words of release are used, such construction as will exclude exemption from negligence must obtain, if the release is not thereby

<sup>1</sup> *Kenney v. New York Cent. & H. R. R. Co.* 125 N. Y. 422; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Holsapple v. Rome, W. & O. R. Co.* 86 N. Y. 275; *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 370.

<sup>2</sup> *Hopkins v. Westcott*, 6 Blatchf. 67; *Pratt v. Ogdensburg & L. C. R. Co.* 102 Mass. 557.

<sup>3</sup> *Zimmer v. New York Cent. & H. R. R. Co.* 42 N. Y. S. R. 63.

<sup>4</sup> *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454.

<sup>5</sup> *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661.

<sup>6</sup> *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

<sup>7</sup> *Jennings v. Grand Trunk R. Co.* 52 Hun, 227.

rendered inoperative.<sup>1</sup> A contract releasing a carrier from all damage to goods from any cause not the result of collision or cars being thrown off the track, does not release from liability for negligence not resulting in collision or derailment.<sup>2</sup>

A bill of lading relieving a carrier of perishable goods, generally, from all responsibility for delays, will not relieve it from liability for the delays occasioned by the negligence of its own agents and servants where they are not expressly specified.<sup>3</sup> A common carrier which enters into a contract exempting it from liability for the negligence of its servants is not thereby exempt from liability for its own negligence.<sup>4</sup> An exception in a bill of lading, in regard to liability for injury to cargo of any neglect or default of the master, mariners, or others in the service of the owners, does not include negligence of the owners themselves.<sup>5</sup> A shipping contract will not so operate unless the intent is so clearly expressed that the shipper could not be misled. It cannot be inferred from general words in the contract, such as "damages occasioned by delays from any cause or from change of weather."<sup>6</sup>

### § 17. *Statutes Limiting Power of Carrier to Contract against its own Negligence.*

In many of the states the power of the carrier to limit its common law liability by special contract is restricted by statute or entirely denied. A railroad company operating a line of railroad in Nebraska is a common carrier, and cannot, under the provisions of the Constitution, limit its liability as such by special agreement with a shipper.<sup>7</sup> A stipulation in a contract of shipment, limiting the liability of the carrier to a certain amount in

<sup>1</sup> *Elliott v. New York Cent. & H. R. R. Co.* 33 N. Y. S. R. 861; *Kenney v. New York Cent. & H. R. R. Co.* 125 N. Y. 422, affirming 54 Hun, 143.

<sup>2</sup> *Phoenix Clay Pot Works v. Pittsburg & L. E. R. Co.* 139 Pa. 284.

<sup>3</sup> *McKay v. New York Cent. & H. R. R. Co.* 50 Hun, 563.

<sup>4</sup> *Weinberg v. National S. S. Co.* 25 Jones & S. 586.

<sup>5</sup> *The Guildhall*, 58 Fed. Rep. 796.

<sup>6</sup> *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 370; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 183, 27 Am. Rep. 28.

<sup>7</sup> *Missouri Pac. R. Co. v. Vandeventer*, 3 L. R. A. 129, 26 Neb. 222.

case of damage to the property shipped, is not valid and binding on the shipper; and he may recover the damages to which he shows himself entitled under the measure of damages fixed by law in Texas.<sup>1</sup>

And in Texas a statute enacted in 1860 is to the effect that carriers within that state may not "limit or restrict their liability, by any general or special notice, nor by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, nor in any other manner whatever. And no special agreement made in contravention of the foregoing provisions shall be valid."<sup>2</sup>

A provision limiting the liability of a railway company to its own line, in a bill of lading from a railway station in Texas to Galveston, in the same state, thence by steamer to Liverpool, purporting to be a foreign bill of lading and signed by one who signs as agent severally for the railway and the steamship companies, does not make it a domestic bill of lading so as to bring it within Tex. Rev. Stat. art. 278, forbidding carriers between points within the state from limiting their common law liability.<sup>3</sup>

Since *Christenson v. American Exp. Co.*, 15 Minn. 270, it has been settled by judicial decision in that state that a common carrier cannot exonerate himself by contract from liability for his own negligence, and this rule is now recognized by statute.<sup>4</sup>

Under section 1308 of the Iowa Code, a contract between a railroad company and a shipper of horses, limiting the liability of the company for the horses to an amount less than their actual value, is invalid. The section of the Iowa Code which provides that all contracts by which carriers seek to limit their liability shall be declared invalid is not repugnant to the Constitution of the United States, as being a regulation of commerce.<sup>5</sup>

Under the Massachusetts Public Statutes, chap. 112, § 214, a railroad company is not liable for goods destroyed by fire while

<sup>1</sup> *St. Louis, A. & T. R. Co. v. Robbins* (Tex. App.) Dec. 14, 1889.

<sup>2</sup> *Missouri Pac. R. Co. v. Sherwood*, 17 L. R. A. 643, 4 Inters. Com. Rep. 640, 84 Tex. 125.

<sup>3</sup> Gen. Laws, 1885, chap. 188, § 26.

<sup>4</sup> *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 435.

<sup>5</sup> *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314.

in its possession, under a contract of carriage excepting this risk. Where the goods are in its possession not under such exception in the contract, it is liable for their destruction by fire communicated by locomotives.<sup>1</sup>

### § 18. *Limitation of Amount of Liability by Statute—Act of Congress.*

The maritime law of the United States, as found in the statutes, is the same as the general maritime law of Europe. It is different from that of Great Britain in this: the former gauges the liability of the value of the ship and freight after the loss or injury, and the latter by their value before the loss or injury, not exceeding fifteen pounds per ton.<sup>2</sup>

The institution of proceedings in the district court of the United States, under the Limited Liability Act of 1851, supersedes the prosecution in other courts of claims for the same losses and injuries. The first section of the Act exempts shipowners from liability for losses by fire, "unless such fire is caused by the design or neglect of such owner or owners." The second section relates to the shipping of precious metals and other valuables without giving notice of their character and value, and exempts the master and owners, in such cases, from liability as carriers.\*

The third section declares that the liability of shipowners for embezzlement, loss or destruction of goods on board ship by the

\*NOTE.—"Trinkets," within the meaning of U. S. Rev. Stat. § 4281, requiring shippers of certain articles to give written notice to the carrier of the true character and value thereof, include fans and parasols made of delicate and expensive materials, ornamented with carving, fragile in construction, and intended more for ornament than use, although possessing to some extent the quality of utility. A lady's shawl made exclusively of Chantilly lace is "lace" within the meaning of U. S. Rev. Stat. § 4281, requiring notice to carriers of the true character and value of certain articles shipped. *Ocean SS. Co. v. Way*, 20 L. R. A. 123, 90 Ga. 747.

<sup>1</sup> *Bassett v. Connecticut River R. Co.* 145 Mass. 129; *Blaisdell v. Connecticut River R. Co.* 145 Mass. 132.

<sup>2</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 1001; *New York & W. SS. Co. v. Mount* ("The Benefactor") 103 U. S. 239, 26 L. ed. 466.



master, crew, passengers or others, or for loss or damage by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without privity or knowledge of the owner or owners, shall in no case exceed the value of the interest of such owner or owners in such ship and the freight then pending. Section 4 prescribes the mode of proceedings to be taken by freighters and owners for the purpose of apportioning the sum for which the owner or owners may be liable amongst the parties entitled thereto. The last section declares that the Act shall not apply to the owner or owners of any canal-boat, barge or lighter, or other vessel used in rivers or inland navigation.<sup>1</sup>

In the words "Any vessel of any description whatsoever, used in river or inland navigation," excepting the owner of such vessel from the benefit of limitation of liability, given by the Act to owners of other vessels, the word "used" means "employed."<sup>2</sup>

The Federal Statutes of 1884, chapter 121, section 18, did not, prior to the statute of 1886, chapter 21, extend the limitation of responsibility therein provided for to owners of fishing vessels and their actual liability remained.<sup>3</sup> The Limited Liability Act, reproduced in Revised Statutes, § 5282, etc., applied to owners of foreign as well as domestic vessels, and acts done on the high seas as well as in the waters of the United States, except when a collision occurs between two vessels of the same foreign nation or perhaps of two foreign nations, having the same maritime law.<sup>4</sup> It applies to vessels navigating the high seas between ports and places within the same state.<sup>5</sup> It does not release the owners from the payment of costs in a district court beyond the amount of the stipulation filed therefor, if they appear and make defense, or on appeal to the circuit court or from interest in the nature of damages occasioned by the appeal.<sup>6</sup>

<sup>1</sup> *Providence & N. Y. SS. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, reversing 113 Mass. 495, 125 Mass. 292, Field, J., dissenting.

<sup>2</sup> *Moore v. American Transp. Co.* 65 U. S. 24 How. 1, 16 L. ed. 674.

<sup>3</sup> *Simpson v. Story*, 145 Mass. 497.

<sup>4</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 1001.

<sup>5</sup> *Lord v. Goodall, N. & P. SS. Co.* 102 U. S. 541, 26 L. ed. 224.

<sup>6</sup> *The Wanata v. Avery*, 95 U. S. 600, 24 L. ed. 461.

The Act of Congress of 1851 limiting the liability of shipowners, includes collisions as well as injuries to the cargo<sup>1</sup> and the limitation of liability under Rev. Stat. §§ 4282, 4287, in a case where a vessel is injured by a collision by causes over which it had no control, is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner. The limitation extends to the owner of property as well as to his person.<sup>2</sup> Under the Act of 1851, the owners of ships and vessels are not liable for injury by collision occasioned without their knowledge beyond the amount of their interest in such ship or vessel.<sup>3</sup> The owners of a vessel stranded by negligence of the master are entitled to limitation of their liability, under U. S. Rev. Stat. §§ 4283-4287, if they were in no way privy to the faults that brought about the stranding.<sup>4</sup>

The law of limited liability of shipowners applies to cases of personal injury and death, as well as to cases of loss of, or injury to, property. It extends to liability for every kind of loss and injury.<sup>5</sup> Limited liability may be claimed (1) by way of defense to an action, or (2) by surrendering the ship or paying the value into court. The latter method is only necessary when the owner desires to bring all the creditors claiming damages into concourse for distribution.<sup>6</sup> The right to proceed for limitation of liability is not lost or waived by a surrender of the ship to underwriters. Where the owner pays into court the amount of his liability it extinguishes the claims against the vessel *in rem*, as well as against him *in personam*. The time at which the amount or value of the owner's interest in a ship and freight is to be determined, is the termination of the voyage, in which the loss or damage occurred, which is terminated for that purpose when the ship is lost at sea or the voyage is otherwise broken up before arriving at the port

<sup>1</sup> *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104, 20 L. ed. 585.

<sup>2</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134.

<sup>3</sup> *The Baltimore v. Rowland*, 75 U. S. 8 Wall. 377, 19 L. ed. 463; *The Cayuga v. Hoboken Land & Imp. Co.* 81 U. S. 14 Wall. 270, 20 L. ed. 828.

<sup>4</sup> *The City of Para*, 44 Fed. Rep. 689.

<sup>5</sup> *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017.

<sup>6</sup> *Thommessen v. Whitwill*, 118 U. S. 523, 30 L. ed. 156.

of destination.<sup>1</sup> Where the offending vessel in a collision did not sink in consequence thereof, but was afterwards sunk and wrecked in the same voyage by negligent navigation, this was the termination of the voyage for fixing the liability of her owners.<sup>2</sup> Where a collision occurred by which an offending ship and her cargo were sunk at sea, but strippings from the ship were rescued before she went down, from which the owners afterwards realized several thousand dollars, it was decided, in awarding damages against the owners under Revised Statutes, sections 4283-4287, limiting liability to the amount of their interest in the ship, that the court is not bound to allow interest on the proceeds of the wreck, or strippings, but may in its discretion allow interest or not. Allowance of interest by way of damages, in cases of collision and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.<sup>3</sup>

This liability of shipowners may be discharged by their surrendering and assigning the vessel and freight for the benefit of the parties injured, in pursuance of section 4, although these may have been diminished in value by collision or other casualty during the voyage, and, it seems that for their total loss, the owners will be entirely discharged. The amount, if insufficient to pay the damages caused, will be apportioned *pro rata* among the owners of the injured vessel, and the cargoes of both vessels, in proportion to their respective losses.<sup>4</sup>

Insurance is no part of the owner's interest in the ship or freight, within the meaning of the law and does not enter into the amount for which the owner is held liable.<sup>5</sup>

In a case of collision occasioned by the negligence of the officers or hands of one of the vessels, without any neglect, privity or knowledge of her owner, where such vessel took fire, and sank,

<sup>1</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134.

<sup>2</sup> *Thommessen v. Whitwill*, *supra*.

<sup>3</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 1001.

<sup>4</sup> *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104, 20 L. ed. 585

<sup>5</sup> *Thommessen v. Whitwill*, 118 U. S. 523, 30 L. ed. 156; *The Bristol*, 29 Fed. Rep. 867.

with loss of the cargo, and therefore never completed her voyage, nor earned any freight, but was afterwards raised by her owner and repaired, and being then libeled and seized on behalf of the owners of her cargo, was claimed by him and bonded at her then value and an answer and a petition for limited liability filed, although he had received insurance on the ship for loss by fire, and he was held entitled to a limitation of liability to the value of his interest in ship and freight after she had sunk, under Revised Statutes, sections 4282, 4287 (Act of 1851).<sup>1</sup>

As between two vessels, both of which are in fault in a collision, the statute as to the liability of the owners applies only to a claim for one half the difference between their respective losses, that being the extent of the owners' liability.<sup>2</sup>

The amount recovered in a collision suit, whether before limitation proceedings are commenced or afterwards, and whether in a court of first instance or in an appellate court, will stand as a basis for priority of division when the fund is distributed. In all other respects, the proceedings for limitation of liability may be conducted within the ordinary course.<sup>3</sup> The subsequent raising and repairing of a sunken vessel and giving her increased value has nothing to do with the amount of liability. No freight is to be estimated in finding the amount except what is earned. The appraisement of a vessel upon which she is delivered to claimants upon a stipulation for her value in a collision suit, does not take away the jurisdiction of the court to allow a reappraisement for the purpose of fixing her value, in proceedings for limitation of liability.<sup>4</sup> Under the Limited Liability Act (U. S. Rev. Stat. § 4283) the liability of a ship owner for the "freight then pending" extends to passage money, and to freight prepaid at the port of departure.<sup>5</sup>

<sup>1</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134.

<sup>2</sup> *Reynolds v. Vanderbilt* ("The North Star") 106 U. S. 17, 27 L. ed. 91.

<sup>3</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134; *New York & W. SS. Co. v. Mount* ("The Benefactor") 103 U. S. 247, 26 L. ed. 466.

<sup>4</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134.

<sup>5</sup> *The Main v. Williams*, 152 U. S. 122, 38 L. ed. 381.

The owners of a steamer are not relieved from their common law liability for failing to use appliances necessary for the protection of property on shore, by United States Revised Statutes, section 4491, providing that no kind of instrument, machine, or equipment for the better security of life shall be used on any steam vessel, which shall not be first approved by designated persons, as such provision is made for the benefit of the passengers.<sup>1</sup> The provision of the Act of Congress of Feb. 13, 1893, § 3, in terms exempting vessels and their owners from all liabilities whatever if the vessel is seaworthy and properly manned, equipped, and supplied, must be read with the limitation that it relates only to the rights and liabilities of owners and shippers as between themselves with respect to the cargo, which are the subjects of the Act, and does not abolish all liability and remedy for all marine torts of vessels transporting merchandise to and from any port in the United States.<sup>2</sup>

Proceedings taken by the owner of the vessel, by libel or limited liability, are a bar to actions commenced to recover damages for losses sustained by means of the stranding and sinking of the vessel,<sup>3</sup> and the libelants and intervenors may be restrained from collecting or attempting to collect or enforce their respective decrees in any other manner than by the *pro rata* distribution of the fund standing by stipulation, in place of the ship and freight.<sup>4</sup>

### § 19. *Law of Place of Contract of Affreightment.*

Any contract of exemption of a common carrier must be proved as a matter of evidence, according to the law of the forum.<sup>5</sup> The general rule is that the law of a country where a contract is made, governs, as to the nature, the obligation and the interpretation of it. The parties to the contract, are either the subjects of the power there ruling, or as temporary residents, owe it

<sup>1</sup> *Cheboygan Lumber Co. v. Delta Transp. Co.* (Mich.) April 10, 1894.

<sup>2</sup> *The Berkshire*, 59 Fed. Rep. 1007.

<sup>3</sup> *Butler v. Boston & S. S. Co.* 130 U. S. 527, 32 L. ed. 1017.

<sup>4</sup> *New York & W. S. S. Co. v. Mount* ("The Benefactor") 103 U. S. 239, 26 L. ed. 351.

<sup>5</sup> *The Guildhall*, 58 Fed. Rep. 796.

a temporary allegiance. In either case equally, they must be understood to submit to the law there prevailing and to agree to its action upon their contracts. It is, of course, immaterial that such agreement is not expressed in terms. It is equally an agreement in fact, presumed *de jure*; and a foreign court, interpreting or enforcing it on any contrary rule, defeats the intention of the parties as well as neglects to observe the comity of nations. It was accordingly held in *Peninsular & O. Steam Nav. Co. v. Shand*, 3 Moore, P. C. N. S. 272, 290, Lord Justice Turner delivering judgment in the privy council, reversing the decision of the supreme court of Mauritius, that the law of England and not the French law in force at Mauritius, governed the validity and construction of a contract made in an English port between an English company and an English subject, to carry him thence by way of Alexander and Suez, to Mauritius; and containing a stipulation that the company should not be liable for loss of passengers' baggage, which the court in Mauritius had held to be invalid by the French law. Justice Turner observed that it was a satisfaction to find that the court of cassation in France had pronounced a judgment to the same effect, under precisely similar circumstances in the case of a French officer taking passage at Hong Kong, an English possession, for Marsailles, in France, under a like contract, in a ship of the same company, which was wrecked on the Red Sea, owing to the negligence of the master and crew.<sup>1</sup> That decision was in accordance with an earlier one of Mr. Justice Story, in *Pope v. Nickerson*, 3 Story, 465, as well as with later ones in the privy council, on appeal from the high court of admiralty, in which the validity of a bottomry bond has been determined by the law prevailing at the home port of the ship, and not by the law of the port where the bond was given.<sup>2</sup>

<sup>1</sup> *Julien v. Peninsular & Oriental Co.*, imperfectly cited by 3 Moore, P. C. N. S. 282, note, and fully reported in 75 Journal du Palais, 225, 1864. See the case of *Lloyd v. Guibert*, 6 Best & S. 100, L. R. 1 Q. B. 115, decided in the Queen's Bench above, and in the Exchequer Chamber, after the decision in the Privy Council just referred to.

<sup>2</sup> *The Karnak*, L. R. 2 P. C. 505, 512; *The Gaetano*, L. R. 7 Prob. Div. 137; *Liverpool & G. W. SS. Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 783. See also *The Woodland*, 7 Ben. 110, 118, 14 Blatchf. 499-503, 104 U. S. 180, 26 L. ed. 705.

In *Chartered Mercantile Bank v. Netherlands I. S. Nav. Co.* L. R. 9 Q. B. Div. 118, L. R. 10 Q. B. Div. 521, 529, 536, a bill of lading issued in England in the English language to an English subject by a company described therein as an English company, and registered, both in England and in Holland for goods shipped at Singapore, an English port, to be carried to a port in Egypt, a Dutch possession, in a vessel with a Dutch name, registered in Holland, commanded by a Dutchman and carrying the Dutch flag in order to obtain the privilege of trading with Egypt, was held to be governed by the law of England and not by that of Holland, in determining the validity and construction of a clause exempting the company from liability for the negligence of the master and crew; and Lords Justices Brett and Lindley both considered it immaterial whether the ship was regarded as English or Dutch. The general rule is that where a contract is made in one country between merchants carrying on business there, but to be performed elsewhere, the construction of the contract and all its incidents are to be governed by the law of the country where the contract is made, unless it is plain to see that the intention of the parties was that the law of the country where the contract is to be performed, should prevail. A contract for the conveyance of cattle from Boston to England, on a British ship, by a British company, made in English forms containing exceptions as to perils from "the Queen's enemies," must be considered to have been made with reference to the laws of England; and the clause therein exempting the carrier for negligence, which are valid according to the English law, will be held valid by English courts.<sup>1</sup> The broad rule is that the law of a country where a contract is made presumably governs the nature, the obligation and interpretation of it, unless the contrary appears to be the express intention of the parties. A contract by a carrier limiting its liability for damages to freight shipped, from any cause whatever, to the valuation agreed upon, made in the District of Columbia in regard to goods shipped from Washington to a point in another state, and valid in that district, is valid everywhere.<sup>2</sup>

<sup>1</sup> *Re Missouri SS. Co.* (Eng. Ct. App.) 7 Ry. & Corp. L. J. 5.

<sup>2</sup> *Fairchild v. Philadelphia, W. & B. R. Co.* 148 Pa. 527.

Where a bill of lading was made and dated in New York, and signed by the ship's agent there, acknowledging that the goods have been shipped "on the company's steamship called 'Montana' now lying in the port of New York, and bound for the port of Liverpool," and are to be delivered at Liverpool; containing no indication that the owners of the steamship are English, or that their principal place of business is in England, the only description of the line of steamships or of the place of business of their owners being in a memorandum in the margin as follows: "Guyon Line of U. S. Mail Steamers, New York, 29 Broadway; Liverpool, 11 Rumford St.," with a reservation of liberty in case of interruption of the voyage "to tranship the goods by another steamer," which would permit transhipment into a vessel of another line, English or American, the general average to be computed not by any local law or usage, but "according only to Antwerp rules," which are the rules drawn up in 1864 at York in England, and determined in 1877 at Antwerp in Belgium, at the international conference of representatives of the more important mercantile associations of the United States, as well as of the maritime countries of Europe (Lown. Av. 3d ed. App. 9) it was held, that the contract, being made at New York, the shipowner having a place of business there, and the shipper being an American, both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action upon their contract. The contract was held a single one, and its principal object, the transportation of goods, to be one continuous act, to begin in the port of New York, to be chiefly performed on the high seas, and to end at the port of Liverpool. The facts that the goods are to be delivered at Liverpool, and the freight and primage therefor payable there in sterling currency, did not make the contract an English contract or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the case of a breach.<sup>1</sup>

<sup>1</sup> *Peninsular & O. Steam Nav. Co. v. Shand*, 3 Moore P. C. N. S. 272, 290; *Lloyd v. Guibert*, 6 Best & S. 100, L. R. 1 Q. B. 115; *Chartered Mercantile Bank of India v. Netherlands I. S. Nav. Co.* L. R. 9 Q. B. Div. 118, and L. R. 10 Q. B. Div. 521.



It was held also that there was even less ground for holding three bills of lading of cotton to be English contracts. Each of them was made and dated at Nashville, an inland city, and as a through bill of lading over the Louisville & Nashville Railroad and its connections, and by the Williams & Guyon Steamship Co. from Nashville to Liverpool and the whole freight from Nashville to Liverpool is to be "at the rate of 54 tenths sterling per hundred pounds, gross weight," it is concluded that the liability of the Louisville & Nashville Railroad and its connections, as common carriers, "terminates on the delivery of the property to the Steamship Company at New York, when the liability of the steamship commences, and not before;" and that "the property shall be transported from the port of New York to the port of Liverpool by the said steamship company, with liberty to ship by any other steamship or steamship line." On the margin is this significant reference to the provision of the statutes of the United States applicable to ocean transportation only, "Attention of shippers is called to the Act of Congress of 1851, that any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, on a ship or vessel taking a cargo for divers persons on board, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars."<sup>1</sup>

It was argued that as each bill of lading, drawn up and signed by the carrier, and assented to by the shipper, contained a stipulation that the carrier should not be liable for losses by perils of the sea arising from the negligence of its servants, both parties must be presumed to have entered into and to be bound by that stipulation, and must therefore (the stipulation being void by our law and valid by the law of England) have intended that their contract should be governed by the English law; and one passage in the judgment in *Peninsular & O. Steam Nav. Co. v. Shand*, 3 Moore, P. C. N. S. 272, 291, was said by the Supreme Court of

<sup>1</sup> Act of March 3, 1851 (9 Stat. at L. 635, chap. 43, § 7) Rev. Stat. § 4288.

the United States in deciding the case, to give some color to the argument; but it was added that the facts of the two cases are quite different in this respect; in the case cited, effect was given to the law of England where the contract was made, and both parties were English, and must be held to have known the law of their own country, while in the case in judgment, the contract was made in this country, between parties, the one residing and the other doing business here; and the law of England is a foreign law which the American shipper is not presumed to know. Both parties, or either of them, it was said, may have supposed the stipulation to be valid, or either of them may have known that, by our law, as declared by the Supreme Court of the United States, it was void, but in either case it is not concluded that there is any ground for inferring that the shipper at least, had any intention, for the purpose of securing its validity, to be governed by a foreign law, which he has not been shown and cannot be presumed to have had any knowledge of. Accordingly, it was held that each of the bills of lading is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of another country. That, as by the law of this country, the stipulation by which the appellant undertook to exempt itself from liability for the negligence of its servants, is contrary to public policy, and therefore, void, and the loss of the goods was a breach of the contract, for which the shipper might maintain a suit against the carrier, that this being so, the fact that the place where the vessel went ashore in consequence of the negligence of the master and officers in the prosecution of the voyage, was upon the coast of Great Britain, is quite immaterial.<sup>1</sup>

In *Jacobs v. Crédit Lyonnais*, L. R. 12 Q. B. Div. 589, a contract made in London between two English mercantile houses by which one agreed to sell to the other 20,000 tons of Algerine esparto, to be shipped by a French company at an Algerian port, in British vessels, furnished by the purchasers at London, and to

<sup>1</sup> *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788; *The Brantford City*, 29 Fed. Rep. 373.

be paid for by them in London on arrival, was held to be an English contract, governed by English law, notwithstanding that the shipment of the goods in Algiers had been prevented by *vis major*, which, by the law of France, in force there, excused the seller from performance of the contract. In *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 538, 546, 39 Am. Dec. 398, goods were shipped at New York for Providence in Rhode Island, or Boston in Massachusetts, on a steamboat employed in the business of transportation between New York and Providence; and an exemption claimed by the carrier under a published notice, was disallowed by the supreme court of Connecticut, because, by the then law of New York, the liability of the carrier could not be limited by such a notice. Williams, *Ch. J.*, delivering judgment, said: "The question is, by what law is this contract to be governed? The rule upon that subject is well settled, and has been often recognized by this court, that contracts are to be considered according to the laws of the state where made, unless it is presumed, from their tenor, that they were entered into with a view to the laws of some other state." There is nothing in this case, either from the location of the parties or the language of the contract, which shows that they could have had any other law in view than that of the place where it was made. Indeed, as the goods were shipped to be transported to Boston or Providence there would be the most entire uncertainty what was to be the law of the case, if any other rule was to prevail. We have therefore, no doubt that the law of New York as to the duties and obligations of common carriers, is the law of the case."

In *Dyke v. Erie R. Co.* 45 N. Y. 113, 117, 6 Am. Rep. 43, a passenger, traveling upon a ticket, by which a railroad corporation, established in New York, and whose road extended from one place to another in that state, passing through the states of Pennsylvania and New Jersey, by their permission, agreed to carry him from one to another place in New York, was injured in Pennsylvania, by the laws of which the damages in actions against railroads for personal injury, were limited to \$3000, the court of appeals in New York held that the law of Pennsylvania had no application to the case. Mr. Justice Allen, deliver-

ing the opinion, referred to the case of *Peninsula & O. Steam Nav. Co. v. Shand*, 3 Moore, P. C. (N. S.) 272, as analogous in principle, and said: "The contract was single, and the performance one continuous act. The defendant did not undertake for one specific act in part performance in one state, and another specific and distinct act in another of the states named, as to which the parties could be presumed to have had in view the laws and usages of distinct places. Whatever was done in Pennsylvania was part of a single act of transportation from Utica or Waverly in the state of New York, to the city of New York, and in performance of an obligation assumed and undertaken in this state, and which was indivisible. The obligation was created here, and by force of the laws of this state, and force and effect must be given to it in conformity to the laws of New York. The performance was to commence in New York, and to be fully completed in the same state, but liable to breach, partial or entire in the states of Pennsylvania and New Jersey, through which the road of the defendant passed; but whether the contract was broken, and if broken, the consequences of the breach should be determined by the laws of this state. It cannot be assumed that the parties intended to subject the contract to the laws of other states, or that their rates and liabilities should be qualified or varied by any of the different rates that might exist between the laws of these states and the *lex loci contractus*."

In *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412, 417, cattle, transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailling of the trains, were injured in Illinois by the negligence of the company's servants, and the supreme court of Iowa (Chief Justice Dillon presiding) held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of a contract. The court said, "The contract being entire and indivisible, made in Iowa and to be partly performed here, it must, as to its validity, nature, obligation and interpretation, be governed by our law;

and by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties then, are to be determined under the common law, the same as if no such contract had been made. In *Pennsylvania Co. v. Fairchild*, 69 Ill. 260, where a railroad company received in Indiana goods consigned to Leavenworth, in Kansas, and carried them to Chicago, in Illinois, and there delivered them to another railroad company in whose custody they were destroyed by fire, the supreme court of Illinois held that the case must be governed by the law of Indiana, by which the first company was not liable for the loss of the goods after they had passed into the custody of the next carrier in the line of transit. The reservation by the supreme court of New Hampshire of any expression of opinion in *Gray v. Jackson*, 51 N. H. 9, 39, 12 Am. Rep. 1, whether the liability of a railroad corporation for goods transported through parts of two states, was that of a common carrier or of a forwarder only, should be governed by the law of the state in which the loss happened, must be held to qualify the suggestion to that effect in *Barter v. Wheeler*, 49 N. H. 9, 29, 6 Am. Rep. 434, that suggestion being unnecessary to the decision in that case.

But courts often refuse to recognize contracts releasing liability for negligence, valid where made on the ground that they violate the state policy. That a carrier who stipulates not to be bound to the exercise of care and diligence, seeks to put off the essential duties of his employment. For those duties cannot be waived in respect to his agents or servants, especially where the carrier is an artificial being, incapable of acting except by agent and servants. The law demands of the carrier carefulness and diligence in performing the service; not merely an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law. The carrier and his customer do not stand upon a footing of equality, and, since in many cases the latter has no alternative as to the kind of bill he will receive, he should not be estopped by its contents.<sup>1</sup>

<sup>1</sup> *Lallande v. His Creditors*, 42 La. Ann. 705.

The individual customer has no real freedom of choice. He cannot afford to higggle or stand out and seek redress in the courts. He prefers to accept any bill of lading or to sign any paper that the carrier presents, and in most cases he has no alternative but to do this, or to abandon his business. Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident or beyond its own line,<sup>1</sup> or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles liable to be stolen or damaged unless informed of their character or value; or for perishable articles or live animals when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment. It being against the policy of the law to allow stipulations which will relieve the railroad company from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.<sup>2</sup>

Where our law disallows a stipulation made in favor of carriers doing business in this country, our national policy cannot permit the adoption by a foreign carrier doing business and making contracts here with our citizens, of a law of such carrier's flag which permits such stipulations and enforces them.<sup>3</sup> A limitation of liability in a bill of lading absolving the owners of the ves-

<sup>1</sup> *Wabash, St. L. & P. R. Co. v. Jaggerman*, 115 Ill. 407.

<sup>2</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 359, 363, 384, 21 L. ed. 634, 635, 642; *Southern Exp. Co. v. Culdrill*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 183, 23 L. ed. 872, 876; *Canada G. T. R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 338, 28 L. ed. 717, 720; *Phenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 322, 29 L. ed. 873, 879; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612.

<sup>3</sup> *The Brantford City*, 29 Fed. Rep. 373.

sel from any neglect or default of the master, mariners, or others in their service, though valid by the law of the country of such vessel and that of the port of departure, will not be enforced in the United States where the obligation of the vessel as a common carrier was to deliver her cargo safely at the port of New York, since such a stipulation on the part of a common carrier in a bill of lading is void as against public policy.<sup>1</sup>

But a contract of carriage exempting the carrier from liability for negligence, which is valid under the law of the state where it is made, and is to be wholly performed, and in which the alleged breach occurs, has been enforced in another state although such a contract would be invalid under its law.<sup>2</sup> A contract in a bill of lading for a shipment from Boston to Atlanta, although it would not have been a good contract if made in Georgia, can be enforced in that state if it is a good contract in Massachusetts and was not intended to take effect wholly in Georgia, but was to be partly performed in several different states, including Massachusetts.<sup>3</sup> But no state will enforce a contract injurious to good morals or public safety.<sup>4</sup>

<sup>1</sup> *The Guildhall*, 58 Fed. Rep. 796.

<sup>2</sup> *Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

<sup>3</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

<sup>4</sup> Whart. Conf. L. p. 338, § 490; Story, Conf. L. p. 371, § 244; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 589, 10 L. ed. 274, 308; *Hope v. Hope*, 8 DeG. M. & G. 731; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Oscanayan v. Winchester Repeating Arms Co.* 103 U. S. 276, 26 L. ed. 545; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308.

## CHAPTER III.

### ACCEPTANCE OF GOODS BY CARRIER.

- § 20. *Duty of Carrier to Accept Goods.*
- § 21. *What Constitutes Delivery, Fixing Responsibility of Carrier.*
- § 22. *Liability of Shippers for Goods of a Dangerous Character.*
- § 23. *Liability of Shipper of Dangerous Goods to Employe of Carrier.*

#### § 20. *Duty of Carrier to Accept Goods.*

The common carrier is liable to an action for a refusal to accept and transport goods without a sufficient reason therefor.<sup>1</sup> But a common carrier is not necessarily a carrier of all description of goods, and he is only bound to accept the class of goods which he proposes to transport, and a special contract under which he accepts other goods in a special instance, will relieve him from the obligation of the common carrier as to those goods;<sup>2</sup> and the obligation resting upon him only extends to the acceptance of goods which are to be carried along his usual route and by the ordinary means of transportation adopted by him.<sup>3</sup>

If a reasonable sum is tendered, the carrier cannot refuse the carriage of the goods,<sup>4</sup> if within the class it usually carries, and if the carrier has good grounds for not receiving baggage or property he must insist on them; if he receives them his liability is the same as though no ground of refusal existed.<sup>5</sup> Goods which are

<sup>1</sup> *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353.

<sup>2</sup> *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Central R. & Bkg. Co. v. Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Kimball v. Rutland & B. R. Co.* 26 Vt. 249.

<sup>3</sup> *Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 632; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Pittlock v. Wells, Fargo & Co.* 109 Mass. 452.

<sup>4</sup> *Pickford v. Grand Junction R. Co.* 8 Mees. & W. 372.

<sup>5</sup> *Hunnibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.



not in suitable condition for shipment, or are liable to injury from want of careful packing may be declined.<sup>1</sup> If goods are brought to the carrier at an unseasonable time or, by reason of his coach being full, he has no convenience for carrying the goods with security, he will be excused from taking charge of them.<sup>2</sup> So, an unusual flood of business may exhaust the carrier's means—temporarily—for transportation, and if he has provided reasonably for the expected demands of transportation, he will be excused,<sup>3</sup> provided no unnecessary delay occurs.<sup>4</sup> If delay from any cause occurs after the goods are accepted, notice must be given to the shipper. Otherwise, the carrier will render itself responsible, although the difficulty was unknown at the time of the acceptance of the goods.<sup>5</sup> An unexpected rush of freight will not excuse a carrier from an express contract to carry at a certain time.<sup>6</sup> If, for any reason, the line of travel or the means of conveyance are for the time being especially dangerous, the carrier may decline, for that reason and while such conditions exist, to accept goods under his common law liability.<sup>7</sup>

Where the charter party covenants for no specific amount to be received, what is "a full cargo" is a question to be solved by an experienced shipmaster.<sup>8</sup>

Where, under the Interstate Commerce Act and by express statute, the duty to transport freight is directly imposed, the writ

<sup>1</sup> *Union Exp. Co. v. Graham*, 26 Ohio St. 595.

<sup>2</sup> *Butson v. Donovan*, 4 Barn. & Ald. 32; *Lovett v. Hobbs*, 2 Show. 128; *Anonymous*, 12 Mod. 3; *Edwards v. Sherratt*, 1 East, 604; *Lane v. Cotton*, 1 Ld. Raym. 646.

<sup>3</sup> *Riley v. Horne*, 5 Bing. 217; *Peet v. Chicago & N. W. R. Co.* 20 Wis. 594, 91 Am. Dec. 446.

<sup>4</sup> *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627; *Wibert v. New York & E. R. Co.* 12 N. Y. 245; *Ayres v. Chicago & N. W. R. Co.* 75 Wis. 215; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Great Western R. Co. v. Burns*, 60 Ill. 284.

<sup>5</sup> *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Empire Transp. Co. v. Wamsutta Oil R. & M. Co.* 63 Pa. 14, 3 Am. Rep. 515; *Carter v. Peck*, 4 Sneed, 203, 67 Am. Dec. 604; *Place v. Union Exp. Co.* 2 Hilt. 19.

<sup>6</sup> *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267.

<sup>7</sup> *Phelps v. Illinois Cent. R. Co.* 94 Ill. 548; *Illinois Cent. R. Co. v. Hornberger*, 77 Ill. 457; *Edwards v. Sherratt*, 1 East, 604.

<sup>8</sup> *Ogden v. Parsons*, 64 U. S. 23 How. 167-170, 16 L. ed. 410.

of mandate has been granted to enforce the statutory duty and prevent irreparable injury from the continued and inexcusable refusal;<sup>1</sup> but the court will ordinarily refuse to grant the writ to enforce the acceptance in an isolated instance.<sup>2</sup> Refusal by a shipper to enter into a contract that the carrier shall not be liable unless the owner shall insure for its benefit is no defense to an action to compel transportation by the carrier.<sup>3</sup>

## § 21. *What Constitutes Delivery, Fixing Responsibility of Carrier.*

Delivery of goods to a common carrier for transportation involves exclusive possession in the carrier, and this possession includes a surrender of custody and control for the time being by the consignor.<sup>4</sup> The delivery of goods to the carrier must be complete. The control cannot be shared.<sup>5</sup> When a delivery for shipment is complete, it marks the beginning of the carrier's responsibility.<sup>6</sup> but a carrier cannot open a package or parcel of goods delivered to it for carriage to examine whether it contains other parcels addressed to different persons.<sup>7</sup>

But, unless the carrier provide a place for the reception of goods he is not bound to accept them till he is ready to set out on his accustomed journey.<sup>8</sup> The delivery must be at the time and place designated by the carrier.<sup>9</sup> It is not sufficient that goods be placed upon a platform, or even within the vehicle in which they are to be conveyed, unless notice be given to the carrier and its servants.<sup>10</sup> Goods stored along the line of a railway, awaiting

<sup>1</sup> *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.* 34 Fed. Rep. 481.

<sup>2</sup> *People v. New York, L. E. & W. R. Co.* 22 Hun, 533.

<sup>3</sup> *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612.

<sup>4</sup> *Wilson v. Atlanta & C. R. Co.* 82 Ga. 386, 40 Am. & Eng. R. Cas. 25.

<sup>5</sup> *Brind v. Dale*, 8 Car. & P. 207.

<sup>6</sup> *Mason v. Missouri Pac. R. Co.* 25 Mo. App. 473.

<sup>7</sup> *Crouch v. London & N. W. R. Co.* 2 Car. & K. 789.

<sup>8</sup> *Lane v. Cotton*, 1 Ld. Raym. 652; *Peck v. Smith*, 1 Conn. 105, 6 Am. Dec. 216.

<sup>9</sup> *Buckman v. Levi*, 3 Campb. 414; *Schwey v. Holloway*, 1 Ld. Raym. 46.

<sup>10</sup> *Leigh v. Smith*, 1 Car. & P. 638; *Grosvenor v. New York Cent. R. Co.* 39 N. Y. 34.

shipment, until the necessary means for transportation are provided, are not delivered into possession of the carrier.<sup>1</sup> A place where for a long time there has been no depot, no freight, no agent, no employe stationed to attend to shipments, is not a "regular depot or station" at which a railroad company must receive articles for shipment when tendered, although it has occasionally and irregularly received the lumber from one person, and mail trains regularly stop there to deliver the mail, and the place is set down in circulars and orders of the company as a station.<sup>2</sup> A mere switch at which there is neither agent, station, nor platform, and where shipments are made by loading upon cars placed upon the switch by request, is not a depot so as to render the deposit of freight at the place, a delivery to the company owning it, thereafter liable as a common carrier.<sup>3</sup>

But where a railroad company erects a platform for the purpose of shipping cotton, and its course of business is such that it induces parties to store cotton on it, under a promise to ship by the next freight train, and it passes and neglects to take on said cotton, and it is afterwards destroyed by fire from a passing train, the company is liable for the value of the cotton.<sup>4</sup> But a court will not require by mandate a railroad carrier to establish a freight station for public convenience, even in a town upon its line, at which it has not made a practice of receiving or delivering passengers and freight, when neither charter nor statute prescribe rules controlling the carrier in the location of its stations.<sup>5</sup> And where cotton is in a compress warehouse, and until its actual delivery upon the loading platform for shipment, the carrier's responsibility is only that of a warehouseman.<sup>6</sup>

<sup>1</sup> *Frazier v. Kansas City, St. J. & C. B. R. Co.* 48 Iowa, 571; *Wilson v. Atlanta & C. R. Co.* 82 Ga. 386; *Little Rock & Ft. S. R. Co. v. Hunter*, 42 Ark. 200; *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

<sup>2</sup> *Land v. Wilmington & W. R. Co.* 104 N. C. 48, 40 Am. & Eng. R. Cas. 18.

<sup>3</sup> *Kansas City, M. & B. R. Co. v. Lilly* (Miss.) 45 Am. & Eng. R. Cas. 379.

<sup>4</sup> *Meyer v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 639.

<sup>5</sup> *People v. Chicago & A. R. Co.* 130 Ill. 175.

<sup>6</sup> *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *O'Neill v. New York Cent. & H. R. R. Co.* 60 N. Y. 138; *Michigan, S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515; *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335; *Platt v. Hibbard*, 7 Cow. 497; *Roskell v. Waterhouse*, 2 Stark. 461.

A delivery of goods for shipment at a carrier's warehouse, in the presence of the carrier's agent, and receiving a bill of lading signed by the agent, is a delivery to the carrier, so as to render the latter liable for not shipping the goods within five days, as required by N. C. Code, § 1967.<sup>1</sup> A railroad company is liable for the nonperformance of a contract to carry goods for which it has receipted by its own agent, although its road is in the possession of a lessee.<sup>2</sup> Delivery of a horse at a pen and on a chute provided by the company and designated by its agent for the use in loading a car is sufficient to charge the company if the chute proves rotten, and damages result.<sup>3</sup>

The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the question of ownership of the carriage in which it is transported, nor by the fact that the carriage is loaded by the owner.<sup>4</sup> The duty of loading freight delivered to and accepted by a railroad company for transportation rests primarily upon the company; and a rule by which the shippers of heavy and bulky freight are required to load it upon cars at most requires such shippers to furnish the necessary help to load it, and does not change the company's relation, in regard to property delivered to and accepted by it for the sole purpose of transportation, from that of a carrier to a warehouseman.<sup>5</sup> But the ways and means of loading, the car being in proper condition, and the burden of loading being by agreement upon the shipper, it is his duty to have the car loaded that the train may not be unreasonably delayed.<sup>6</sup>

The delivery must be made to some agent of the carrier, if not to the carrier in person, who is authorized to receive the goods.<sup>7</sup>

<sup>1</sup> *Harrell v. Wilmington & W. R. Co.* 106 N. C. 258, 42 Am. & Eng. R. Cas. 417.

<sup>2</sup> *National Bank of Chester v. Atlanta & C. A. L. R. Co.* 25 S. C. 216.

<sup>3</sup> *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

<sup>4</sup> *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

<sup>5</sup> *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 598.

<sup>6</sup> *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490. See *Frazier v. Kansas City, St. J. & C. B. R. Co.* 48 Iowa, 571.

<sup>7</sup> *Ford v. Mitchell*, 21 Ind. 54; *Harrell v. Wilmington & W. R. Co.* 106 N. C. 258; *Rogers v. Long Island R. Co.* 2 Lans. 269; *Trowbridge v. Chapin*, 23 Conn. 595.

But, if the place be distinctly designated, or adopted by usage, at which the deposit of goods may be made, the carrier, upon such deposit, will become responsible.<sup>1</sup> And a railroad company is liable as a carrier, and not as a warehouseman, for hay delivered to it upon which the freight is paid, though no receipt, shipping bill, or bill of lading is delivered by it, and none of the bales are marked with the names of the consignees, but the marks are put upon the cars when shipped, where the hay is delivered for as early transportation as can be made in the course of the company's business, subject only to such delays as are necessary to enable it to procure cars for the transportation, and there is no omission to direct where it shall be shipped, or to load it, in accordance with the agreement, as fast as the cars are furnished, and no further orders are necessary to enable the company to forward the hay.<sup>2</sup>

One who places his property ready for shipment near the track of a railroad in an exposed and hazardous position, but where the company has been in the habit of receiving such goods, although assuming the risk of fire following the proper and lawful use of locomotives, does not assume the risks of the railroad company's negligence. It is not contributory negligence *per se* to place combustible goods for shipment on a platform erected for the purpose of receiving freight for shipment, near the track of a railroad, where the company has been in the habit of receiving such goods, and leave them without watch, although they will be exposed to danger from fire.<sup>3</sup> If the goods are delivered at the usual place of receiving goods for shipment, and the fact of their delivery is brought home to the carrier or his duly authorized agents, there can be no question as to the responsibility accruing to the carrier as far as the end of his route, for he is bound to keep the goods safely after delivery to him for transportation, as well as to carry them safely.<sup>4</sup>

<sup>1</sup> *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166; *Meyer v. Vicksburg, S. & P. R. Co.* 41 La. Ann. 639; *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344; *Montgomery & E. R. Co. v. Kolb*, 73 Ala. 396, 49 Am. Rep. 54; *Green v. Milwaukee & St. P. R. Co.* 38 Iowa, 100.

<sup>2</sup> *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 598.

<sup>3</sup> *St. Louis, A. & T. R. Co. v. Philadelphia F. Asso.* 55 Ark. 163.

<sup>4</sup> *Dale v. Hall*, 1 Wils. 281; *Clark v. Needles*, 25 Pa. 338; *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783.

In many of the cases it has been held that even where the delivery was made in a customary place, yet it was requisite that notice should be given to the carrier of the facts of such deposit, and of the quantity and number of pieces of which it consisted. And it is undoubtedly true that the rule as to constructive delivery, is one that should be applied with caution, and the question is often one for the determination of the jury.<sup>1</sup> Of course, as the delivery may be to an agent of the carrier, it is not necessary that the shipper should himself make a personal delivery; but this may be done through his agent, who for all purposes is empowered to direct the shipment and agree upon the terms.<sup>2</sup>

Railway companies are accustomed to receive their freight at their freight depots, or at designated points where, during business hours, their agents are present to accept and receipt for goods. Of course, under such circumstances, no question of delivery can be raised. But, when the delivery is attempted at unusual hours, notice should be given of the deposit of the goods. If the deposit be made at a place not specially designated, nor commonly used for that purpose, no delivery will be construed as having taken place, unless the carrier or its proper agent actually consents to receive them, or accepts them in fact.<sup>3</sup>

No well founded distinction can be made as to the liability of

<sup>1</sup> *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475; *Wright v. Caldwell*, 3 Mich. 51.

<sup>2</sup> *Nelson v. Hudson River R. Co.* 48 N. Y. 498; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 113, 18 L. ed. 172; *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Mills v. Michigan Cent. R. Co.* 45 N. Y. 622, 6 Am. Rep. 152; *London & N. W. R. Co. v. Bartlett*, 7 Hurlst. & N. 600; *Barnett v. London & N. W. R. Co.* 5 Hurlst. & N. 604; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867; *Moriarty v. Harnden's Express*, 1 Daly, 227; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Jennings v. Grand Trunk R. Co.* 52 Hun, 227.

<sup>3</sup> *Dwight v. Brewster*, 1 Pick. 50, 11 Am. Dec. 133; *Cronkite v. Wells*, 32 N. Y. 247; *Blanchard v. Isaacs*, 3 Barb. 388; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 483; *Fisher v. Geddes*, 15 La. Ann. 14; *State v. Suffolk & C. R. Co.* 100 N. C. 158; *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.* 35 Mo. 84; *Land v. Wilmington & W. R. Co.* 104 N. C. 48; *Wells v. Wilmington & W. R. Co.* 51 N. C. 47, 72 Am. Dec. 556; *East Line & R. R. Co. v. Hull*, 64 Tex. 615; *Kansas City, M. & B. R. Co. v. Lilly* (Miss.) 45 Am. & Eng. R. Cas. 379; *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487.

the owner of a vessel, between the case of the delivery of goods into the hands of the master at the wharf for transportation on board of a particular ship in pursuance of a contract of affreightment, and the case of loading the goods upon the deck of the vessel. Where the master of a vessel agreed to carry 700 bales of cotton from Mobile to Boston for certain freight mentioned in the bill of lading, the vessel was bound for the safe shipment of the whole 700 bales from the time of their delivery by the shipper at the city of Mobile and acceptance by the master, and the delivery of 100 bales to a lighterman to deliver on board the vessel, was a delivery to the master, and the transportation by the lighter to the vessel was the commencement of the voyage, the same as if the one hundred bales had been placed on board the vessel at the city instead of the lighter. Where both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge, and after the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property, the ship is liable for the loss on the lighter of the 100 bales, the same as any other portion of the cargo.<sup>1</sup> Where the delivery of a cargo to a lighter is equivalent to delivery to the owners of the steamer on which it is to be shipped, the steamer is liable for loss occasioned by negligence of those in charge of the lighter.<sup>2</sup>

A delivery upon a ferryboat has been held complete, when goods were deposited upon the slip of the boat and before placed in actual possession of those in charge of the ferry.<sup>3</sup> But it would seem, upon principle, that there should be some notice to the ferryman of the deposit,—even when it is made upon the boat itself.<sup>4</sup> The liability as a common carrier only commences when the delivery to him is completed. If, according to the usage of business, the delivery is sufficient upon a dock or near

<sup>1</sup> *Bulkley v. Naumkeag Steam Cotton Co.* 65 U. S. 24 How. 386-394, 16 L. ed. 599-602.

<sup>2</sup> *The City of Alexandria*, 24 Blatchf. 50, 28 Fed. Rep. 202.

<sup>3</sup> *Blakeley v. LeDuc*, 19 Minn. 187; *Miles v. James*, 1 McCord, L. 157; *Cohen v. Hume*, 1 McCord, L. 439; *Cook v. Gourdin*, 2 Nott. & McC. 19.

<sup>4</sup> *White v. Winnisimmet Co.* 7 Cush. 155; *Wyckoff v. Queens County Ferry Co.* 52 N. Y. 32, 11 Am. Rep. 650.

the carrier's boat, express notice, nevertheless, it has been said must be given the carrier.<sup>1</sup> But if a common carrier agrees that property for transportation by him may be deposited at a particular place without express notice to him, such deposit is a sufficient delivery. Such agreement may be shown by usage.<sup>2</sup>

A shipper's knowledge of directions to the carrier's agent, not to receive certain articles for transportation, will not relieve the carrier from liability, if their transportation is actually undertaken. If the shipper knew by report, when he delivered the property to the defendant, that its agents had been directed not to receive any game during a closed season, this was no limit of the company's responsibility by special contract; or such knowledge should be brought home to the shipper and assented to by him, as necessary to limit such responsibility.<sup>3</sup> "A carrier may limit his responsibility for property intrusted to him," says Bigelow, *Ch. J.*,<sup>4</sup> "by a notice containing reasonable and suitable restrictions, if brought home to the owner of goods delivered for transportation, and assented to clearly and unequivocally by him. It is also settled that assent is not necessarily to be inferred from the mere fact that knowledge of such notice on the part of the owner or consignee of goods is shown. The evidence must go further, and be sufficient to show that the terms on which the carrier proposed to carry the goods were adopted as the contract between the parties, according to which the service of the carrier was to be rendered." It is undoubtedly the right of the carrier to require good faith on the part of those who deliver goods to be carried, or enter into contracts with him. The degree of care to be exercised, as well as the amount of compensation for the carriage of property, depends largely on its nature and value; and no fraud or deception should be used which would mislead the carrier as to the extent of his duties or the risks which he assumes.

In a late case, where game prohibited by law to be in possession

<sup>1</sup> *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475; *Selway v. Holloway*, 1 Ed. Raym. 46; *Cobban v. Dwyne*, 5 Esp. 41.

<sup>2</sup> *Pratt v. Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336.

<sup>3</sup> *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606.

<sup>4</sup> *Buckland v. Adams Exp. Co.* 97 Mass. 125, 93 Am. Dec. 68.



of any one in the state, was delivered to the carrier, it was said that this property was lawfully the property of the shipper. It was delivered to and accepted by the carrier company for transportation to a point beyond the limits of the state when received. Their liability as common carriers held them to a strict fulfillment of their obligation in relation to the property in their charge. That obligation was not merely to transport the property in the state when accepted, but to a point outside of its limits in another state. When it had lawfully commenced to move as an article of commerce from one state to another, from that moment it became the subject of interstate commerce, and, as such, was subject only to national regulation, and not to the police power of the state. The same is unquestionably true in relation to whatever agency or instrumentality may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale or exchange, under the commerce clause of the Constitution of the United States.<sup>1</sup> The transportation of the subject of interstate commerce, where it is such as may lawfully be purchased, sold, or exchanged, is without doubt a constituent of commerce itself, and is protected by and subject only to the regulation of Congress.<sup>2</sup>

If the property is received upon the premises of the carrier, to wait further instructions before transportation, his liability is that of a warehouseman only, until the instructions are received.<sup>3</sup> If the deposit of the goods on the premises of the carrier is a mere accessory to the carriage, that is, if they are deposited solely for the purpose of being forwarded to their destination without further orders, the responsibility of the carrier begins from the time they are so received; but when the property is

<sup>1</sup> *Bennett v. American Exp. Co.* 13 L. R. A. 33, 83 Me. 236.

<sup>2</sup> *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 565, 19 L. ed. 999, 1002; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 485, 31 L. ed. 700, 707, 1 Inters. Com. Rep. 823; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

<sup>3</sup> *O'Neill v. New York Cent. & H. R. R. Co.* 60 N. Y. 138; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Rogers v. Wheeler*, 52 N. Y. 262. And see *Gilbert v. New York Cent. & H. R. R. Co.* 4 Hun, 378, 6 Thomp. & C. 662.

deposited subject to the further orders of the consignor, the rule is otherwise, as just stated.<sup>1</sup>

Where a carrier receives goods in his own warehouse for the accommodation of his customers and himself so that the storage is to facilitate the carriage, his liability as carrier commences upon receipt of the goods.<sup>2</sup> There is no necessity that the acceptance of the carrier should be evidenced by any written memorandum or receipt. It is sufficient that the goods are left with the carrier without objection, at their proper place.<sup>3</sup> When the carrier attempts to load goods, all question of his responsibility is ended.<sup>4</sup>

## § 22. *Liability of Shippers for Goods of a Dangerous Character.*

The general rule that one engaged in business may refuse to have business relations with any person with whom he does not choose to deal, has a few exceptions of which several are comparatively new, although somewhat analogous to the ancient instances of innkeepers and common carriers. The rule has long been recognized as applying to carriers, and it is well settled that a common carrier cannot refuse to carry a proper article tendered at a reasonable time and place with an offer of usual and reasonable compensation.<sup>5</sup> This doctrine is assumed to be the law in a great multitude of cases, and is indeed involved in the definition of common carriers, but the obligation of a common carrier is only to carry according to its public profession and not necessarily to

<sup>1</sup> *Wade v. Wheeler*, 3 Lans. 201, affirmed in 47 N. Y. 658; *Ladue v. Griffith*, 25 N. Y. 364, 82 Am. Dec. 360; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Marring v. Todd*, 1 Stark. 72; *Michigan, S. & N. I. R. Co. v. Skurtz*, 7 Mich. 515; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Hickox v. Nauvigation R. Co.* 31 Conn. 281, 83 Am. Dec. 143; *Watts v. Boston & L. R. Corp.* 106 Mass. 466. See *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

<sup>2</sup> *Forward v. Pittard*, 1 T. R. 27.

<sup>3</sup> *Aiken v. Chicago, B. & Q. R. Co.* 68 Iowa, 363; *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301; *Woods v. Devin*, 13 Ill. 747, 56 Am. Dec. 483; *Cumden & A. R. & Transp. Co. v. Belknap*, 21 Wend. 354.

<sup>4</sup> *Merritt v. Old Colony & N. R. Co.* 11 Allen, 80; *Thomas v. Day*, 4 Esp. 262.

<sup>5</sup> *Bennett v. Dutton*, 10 N. H. 486.

carry goods of every description.<sup>1</sup> But a common carrier of goods generally is liable in damages for an absolute refusal to receive and carry goods offered without good reason for the refusal,<sup>2</sup> and it will not be accepted as a sufficient legal reason for the refusal, that a shipper declines to inform the carrier of the character of the goods and the contents of the packages offered, unless there be some reasonable grounds justifying such inquiry.<sup>3</sup> It is not a duty incumbent on the carrier to ask the contents in cases free from suspicion. It would be unreasonable in a master or mate, having no reason to suspect that goods offered to him for the general shipment can not safely be stowed away in the hold, —to ask every shipper the contents of every package.<sup>4</sup>

But a stipulation in a charter party to take and carry merchandise, does not compel the master to take goods which, in his honest judgment, cannot be carried without injury to the rest of the cargo.<sup>5</sup> Where goods are offered to the carrier, which he has good reason to suppose are of a dangerous character and will injure other freight, he may require information upon this point, and upon refusal to give such information, he may refuse to take the goods.<sup>6</sup> By the 105th section of 8 & 9 Vict. chap. 20, carriers may refuse to take any parcel they suspect contains goods of a dangerous nature, and require the same to be opened to ascertain the fact. It has been held that the shipper would not be liable for an accident resulting from the transportation of goods, unless he knew the character of the article shipped or was put upon inquiry.<sup>7</sup> Manle, J., denied the accuracy of the remark made by Best, Ch. J., that a carrier has the right to know the value and quality

<sup>1</sup> *Johnson v. Midland R. Co.* 4 Exch. 372. To similar effect *Oxlade v. North-eastern R. Co.* 9 Week. Rep. 272.

<sup>2</sup> *Doty v. Strong*, 1 Pinney, 313, 40 Am. Dec. 773.

<sup>3</sup> *Parrott v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Crouch v. London & N. W. R. Co.* 14 C. B. 256, 7 Exch. 705.

<sup>4</sup> *Brass v. Maitland*, 6 El. & Bl. 412.

<sup>5</sup> *Boyd v. Moses*, 74 U. S. 7 Wall. 316, 19 L. ed. 192.

<sup>6</sup> *The Nith*, 36 Fed. Rep. 86; *Parrott v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206.

<sup>7</sup> *Parrott v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Brass v. Maitland*, 6 El. & Bl. 482; *Hutchinson v. Guion*, 5 C. B. N. S. 162; *Pierce v. Winsor*, 2 Sprague, 35, on appeal, 2 Cliff. 27.

of what he is required to carry.<sup>1</sup> But if the owner of the goods will not tell him what the goods are, and what they are worth, the carrier may refuse to take charge of them.<sup>2</sup>

As the carrier has the right to regulate his charges somewhat by the value of the articles transported, and the liability he thus incurs for their injury or loss—as will appear by the authorities hereafter cited—it is proper that he should inquire of the shipper as to the value of the articles consigned.<sup>3</sup>

Still only when there is good ground for believing that merchandise offered for shipment is of a dangerous character, from the appearance of the package or other circumstances, that the carrier is authorized—in the absence of any special legislation on the subject—to require a knowledge in full detail of the packages offered, as a condition for receiving them for carriage.<sup>4</sup> A freight train upon which passengers are conveyed for compensation, in any kind of car, by authority of the railroad company, is a passenger train within U. S. Rev. Stat. § 5353, forbidding all transportation of nitro-glycerine from one state to another upon public conveyances employed in transporting passengers.<sup>5</sup> Where goods were so carelessly packed as to injure other portions of the cargo, and the carrier was unaware of their real character, the shipper will be liable.<sup>6</sup> Where a general ship was put up for freight, and among other freight offered and taken was mastic, an article then new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it and caused increased expenditure in discharge of the vessel, the court held the shipper and the charterer liable, for it was said that the storage of mastic was made in the usual way, and it was not disputed that it would have been proper if the article should

<sup>1</sup> *Crouch v. London & N. W. R. Co.* 14 C. B. 256.

<sup>2</sup> *Riley v. Horne*, 5 Bing. 217.

<sup>3</sup> *Merchants Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Baldwin v. Liverpool & G. W. S.S. Co.* 74 N. Y. 125, 30 Am. Rep. 277; *Brown v. Cumden & A. R. Co.* 83 Pa. 316.

<sup>4</sup> *Parrott v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Pierce v. Winsor*, 2 Cliff. 18.

<sup>5</sup> *United States v. Saul*, 58 Fed. Rep. 763.

<sup>6</sup> *Brass v. Maitland*, 6 El. & Bl. 470; *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Hearne v. Garton*, 2 El. & Bl. 66.

have been what it was supposed to be when it was received and placed on board. Want of greater care in that behalf was not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other articles. It was true, in that case, that the dangerous character of mastie thus transported was unknown to the shipper, but he was, nevertheless, held liable to refund damages to the owner of the vessel, for losses sustained by other shippers. It was said, that the law imputes to the shipper a knowledge of the dangerous character of the shipments; and he is not relieved from this responsibility although the goods may have passed through many hands.<sup>2</sup>

A manufacturing firm which through its duly authorized agents purchases the cargo of a canal boat, and charters another boat to transport it as refuse salt, and upon arrival refuses to receive it because it is salt cake, is liable to the owner of the boat chartered for damage to the boat from acids in the salt cake, although it was deceived in the purchase.<sup>3</sup>

### § 23. *Liability of Shipper of Dangerous Goods to Employe of Carrier.*

Where the shipper of explosive or combustible substance fails to notify the carrier or his agent of the danger attending its use, when transporting it, and injury results to an employe of the carrier, the owner is liable for the injury sustained. But, when the carrier is notified of the danger of the article or product, and there is marked on the head of the barrel or package that which must necessarily apprise the carrier of its dangerous nature, and the carrier, in his ordinary line of business, undertakes to trans-

<sup>1</sup> *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Dickson v. Bell*, 5 Maule & S. 198; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Tully v. Ayres*, 3 Sneed, 677; *Barney v. Burnsteinbinder*, 64 Barb. 212; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496; *Crouchurst v. Amersham Burial Board*, L. R. 4 Exch. Div. 5.

<sup>2</sup> *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Lane v. Atlantic Works*, 111 Mass. 141; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Illidge v. Goodwin*, 5 Car. & P. 192.

<sup>3</sup> *Carroll v. Walton & W. Co.* 48 Fed. Rep. 123.

port it, and an injury occurs to one of its employes, the shipper cannot reasonably be held liable because knowledge was not brought home to the employe.

In the shipment of a dangerous article there is an implied, if not a positive duty, on the part of both shipper and carrier, to notify those who handle the dangerous substance of its character, and no arrangement made between them, although entered into in the best of faith, by which the dangerous substance may be shipped under the designation of a relatively harmless article, will protect either party from liability from the consequences which result from this deception. Thus, dynamite cannot innocently be shipped as "Powder;" nor can naphtha be transported as "Carbon Oil." To protect either the shipper or the carrier from liability, the brand upon the package must contain sufficient notice of the dangerous substance within it. Thus, the dangerous character of naphtha requires more vigilance and care in shipping and handling it, than almost any other explosive substance; and as a means of greater protection, it would be prudent to give other warning than the mere name of the substance. As an explosive, it is said, the danger is ten times greater than that of gun powder. It ignites as soon as the blaze is applied to it, and becomes explosive when the vapor from it mingles with the atmosphere in which there happens to be a burning lamp or other light.

Where naphtha is shipped, even so marked, the real danger may not be known; but still the shipper, having truthfully marked it, might anticipate that it would put the carrier and its employes upon inquiry, and remove all question of negligence on the part of the shipper. And, in a case where the article was shipped marked "Carbon Oil, Unsafe, for illuminating purposes," it was held that this description in the freight bill and on the barrels was not sufficient notice to inform the employes of the carrier of the danger in handling it, and of their peril in exposing a lighted lamp near it. And, although this mark was in accordance with an agreement between shipper and carrier neither was released from their liability to answer to the employe for the dangerous injury to which they carelessly exposed him.<sup>1</sup>

<sup>1</sup> *Standard Oil Co. v. Tierney*, 14 L. R. A. 677, 92 Ky. 367.

A ruling which holds the shipper liable for an injury to an employe of the carrier, where actual notice of the dangerous character of the article shipped was given to the carrier, and by agreement the designation not warning the employe of the peril in handling the article, is grounded on a principal of law which clearly imputes liability to the owners of their property received by the carrier and thus injured; and unquestionably requires the shipper to answer in damages to the carrier, where he fails, even without inquiry on the carrier's part, to notify it of the danger it incurs, to both its employes and its cargo, from the shipment.<sup>1</sup>

<sup>1</sup> *Boston & A. R. Co. v. Shanly*, 107 Mass. 568; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Brass v. Maitland*, 6 El. & Bl. 470; *Williams v. East India Co.* 3 East, 192; *Pierce v. Winsor*, 2 Cliff. 18.

## CHAPTER IV.

### BILL OF LADING.

- § 24. *Definition of Bill of Lading.*
- § 25. *Bill of Lading as a Contract and as a Receipt.*
- § 26. *Fraud or Mistake in Bill of Lading.*
- § 27. *Bill of Lading Should be Delivered.*
- § 28. “*Contents and Value Unknown*”—“*Weight Unknown*”—  
“*More or Less.*”
- § 29. *Assignment of Bill of Lading.*
- § 30. “*Order*” or “*Assign*” in *Bill of Lading.*
- § 31. *Bill of Lading with Draft Attached.*
- § 32. “*Charges to be Collected*”—“*C. O. D.*”
- § 33. *Usage or Custom as Affecting Carrier’s Liability.*

#### § 24. *Definition of Bill of Lading.*

A bill of lading is the written contract of the parties, and by its terms their rights and liabilities must be measured.<sup>1</sup> It is at once a receipt and a contract. It is an acknowledgment of the receipt of the property and a contract to carry safely and deliver.<sup>2</sup> It is as a receipt, that the bill of lading is chiefly treated as a quasi negotiable instrument; while the carrier remains bound by it and must have his liabilities restricted by it, as a contract.<sup>3</sup> No particular form or solemnity of execution of a bill of lading is required to impose a liability on a common carrier to transport goods. It may be by parol or it may be in writing. In either case it is equally binding.<sup>4</sup>

<sup>1</sup> *Fry v. Louisville, N. A. & C. R. Co.* 103 Ind. 265.

<sup>2</sup> *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077. See note to *Louisville, E. & St. L. R. Co. v. Wilson* (Ind.) 4 L. R. A. 244.

<sup>3</sup> *Blanchard v. Page*, 8 Gray, 281; *Lickbarrow v. Mason*, 5 T. R. 683. See *Abbott, Shipping*, 326; *Scaman v. The Thames*, 81 U. S. 14 Wall. 98, 20 L. ed. 804; *Hazard v. Abel*, 15 Abb. Pr. N. S. 413; *Ontario Bank v. New Jersey S. B. Co.* 59 N. Y. 510; *Bailey v. Hudson River R. Co.* 49 N. Y. 70; *Brandt v. Borthby*, 2 Barn. & Ad. 932; *Dan. Neg. Inst.* § 1728.

<sup>4</sup> *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527.



The great need for uniformity in such contracts has impressed itself on the business community, and thirteen of the twenty-two of the prominent boards of trade, chambers of commerce, and freight associations, composing the National Transportation Association, were represented at the regular quarterly meeting in Chicago on Thursday, May 21, 1891, at the Board of Trade. The Commercial Exchange of Philadelphia and the New Orleans Board of Trade were admitted to membership. Steps were taken to secure the adoption of an official uniform bill of lading for interstate commerce to supersede those now used by common carriers. The following form was adopted:

"Received for transportation from (shipper), in apparent good order, as noted, the packages described below," value unknown. Marked and consigned as per margin and subject to carrier's liability as laid down by the common law in force in the several states, territories, provinces or countries through which the property must pass. "The rate of freight upon property herein described shall not exceed — per — between (shipping point) and (destination).

"Marks and consignments —.

"Description of articles —.

"Weights, subject to correction —.

All attempts to secure more liberal bills of lading from railways having failed, this is to be the initial movement toward securing governmental aid. The Interstate Commerce Commission will be asked to ratify this bill of lading and its adoption by all railroads, as bills of lading over connecting lines to points beyond the state, issued by a railroad whose line is entirely within one state, are subjects of interstate commerce.<sup>1</sup>

The legislature of New York created a corporate body known under the title of the New York Produce Exchange "to inculcate just and equitable principles in trade; to establish and maintain uniformity in commercial usages; to adjust controversies and misunderstandings between persons engaged in business."<sup>2</sup> In concert with the Liverpool Shipowners Association this New York Produce Exchange has presented the form of a bill of lading.

<sup>1</sup> *Re Annapolis, W. & B. R. Co.* 1 Inters. Com. Rep. 315.

<sup>2</sup> Laws 1862, chap. 359, § 3; Laws 1868, chap. 30, § 1; Laws 1882, chap. 36, § 2.

which to a limited extent has been accepted by other exchanges in this country. It is as follows:

NEW YORK PRODUCE EXCHANGE STEAMSHIP BILL OF LADING.

Received in apparent good order and condition, by ----- from -----, to be transported by the good steamship ----- now lying at the port of ----- and bound for -----, with liberty to call at ----- being marked and numbered as per margin (weight, quality, contents and value unknown) and to be delivered in like good order and condition at the port of ----- unto -----, or to his or their assigns, he or they paying freight on the said goods on delivery at the rate of ----- and charges as per margin. General average payable according to York-Antwerp rules.

It is mutually agreed that the ship shall have liberty to sail without pilots; to tow and assist vessels in distress; to deviate for the purpose of saving life or property; to convey goods in lighters to and from the ship at the risk of the owners of the goods but at ship's expense; and in case the ship shall put into a port of refuge for repairs, to transmit the goods to their destination by any other steamship. It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by the perils of the sea or other waters, by fire from any cause on land or on water, by barratry of the master or crew, by enemies, pirates or robbers, by arrest and restraint of princes, rulers or people, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull or machinery, by collisions, stranding, or other accidents of navigation (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owner of the ship or any of them, or by the ship's husband and manager); nor for decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for land damages; nor for the obliteration or absence of marks or numbers; nor for any loss or damage caused by the prolongation of the voyage.

1. It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$500 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made.

2. Also, that shippers shall be liable for any loss or damage to ship or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent, and such goods may be thrown overboard or destroyed at any time without compensation.

3. Also, that the carrier shall have a lien on the goods for all fines or damages which the ship or cargo may incur or suffer by reason of the incorrect or insufficient marking of packages or description of their contents.

4. Also, that in case the ship shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

5. Also, that if the goods be not taken by the consignee within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and risk of their owners.

6. Also, that full freight is payable on damaged goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

7. Also, that if on the sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

8. Also, that in the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom house, less all charges saved.

And finally, in accepting this bill of lading, the shipper, owner and consignee of the goods agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner or consignee.

In witness whereof, the master or agent of the said ship has affirmed to three bills of lading, all of this tenor and date, drawn as "first," "second" and "third," one of which being accomplished, the others to stand void.

Dated in -----, this ---- day of ----, 188...

## § 25. *Bill of Lading as a Contract and as a Receipt.*

A bill of lading is two fold in its character. It is a receipt specifying the quantity, character and condition of the goods received, and it is also a contract by which the carrier agrees to transport the goods therein described to the place named, and there deliver them to the designated consignee upon the terms and conditions specified in the instrument.<sup>1</sup> So far as a bill of lading is in the nature of a receipt or an acknowledgment of the quantity and condition of the goods delivered it may, like any other receipt, be explained, varied, or even contradicted; but as a

<sup>1</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779; *Polaris v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *Goodrich v. Norris*, Abb. Adm. 196; *Chandler v. Sprague*, 5 Met. 306, 38 Am. Dec. 405, and note; *O'Brien v. Gilchrist*, 34 Me. 554, 56 Am. Dec. 676; *Desty, Ship. & Adm.* § 220. Compare *Knox v. The Ninetta*, Crabbe, 534.

contract expressing the terms and conditions upon which the property is to be transported it is to be regarded as a merging of prior and contemporaneous agreements of the parties, and in the absence of fraud, concealment or mistake, its terms or legal import, when free from ambiguity, cannot be explained nor added to by parol.<sup>1</sup>

In the absence of evidences of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, and the route by which they are to be forwarded are merged in the bill of lading. This must be taken as a final repository, and the sole evidence of the agreement between the parties as to these matters.<sup>2</sup> As a contract it is conclusive between shipper and carrier; but as a receipt for the goods, its statements are prima facie evidence only, and may be explained by parol evidence.<sup>3</sup> In so far as it is a contract, it cannot be explained by parol. But so far as it is a receipt, it may be explained by parol, in a suit between the original parties to it.<sup>4</sup> It is not conclusive evidence of the receipt of the goods, or of their condition as between the owner and shipper;<sup>5</sup> and it may be contradicted as to ownership of the goods;<sup>6</sup> or

<sup>1</sup> *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422.

<sup>2</sup> *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422; *Long v. New York Cent. R. Co.* 50 N. Y. 76; *Hinckley v. New York Cent. & H. R. R. Co.* 56 N. Y. 429; *Turner v. St. Louis & S. F. R. Co.* 20 Mo. App. 632.

<sup>3</sup> *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 601, 20 L. ed. 783; *The J. W. Brown*, 1 Biss. 79; *The Martha, Olcott*, 140; *The Wellington*, 1 Biss. 280; *Baxter v. Leland*, Abb. Adm. 348; *The Reeside*, 2 Sumn. 567; *Manchester v. Milne*, Abb. Adm. 115; *Zerega v. Poppe*, Abb. Adm. 397; *Wayland v. Mosely*, 5 Ala. 430, 39 Am. Dec. 335; *Barrett v. Rogers*, 7 Mass. 297, 5 Am. Dec. 45; *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149; *Hastings v. Pepper*, 11 Pick. 41; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Ellis v. Willard*, 9 N. Y. 529; *Wolfe v. Myers*, 3 Sandf. 7; *Cufiero v. Welsh*, 8 Phila. 130; *May v. Babcock*, 4 Ohio, 334; *Dean v. King*, 22 Ohio St. 118; *Warden v. Greer*, 6 Watts, 424; *Williams v. Branson*, 5 N. C. 417, 4 Am. Dec. 562; *Edw. Bailm.* 490.

<sup>4</sup> *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>5</sup> *Gibbons v. Robinson*, 63 Mich. 146; *Merchants Nat. Bank of Cincinnati v. Bangs*, 102 Mass. 291; *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712.

<sup>6</sup> *Chouteau v. Lecch*, 18 Pa. 224, 57 Am. Dec. 602; *Maryland Ins. Co. v. Ruden*, 10 U. S. 6 Cranch, 338, 3 L. ed. 242.

their quantity;' or their condition when shipped.<sup>2</sup> But in so far as it is a contract, parol evidence is not admissible to vary its terms.<sup>3</sup> The bill of lading delivered contains the contract between the ship and the shipper, and shows the duty assumed by the vessel.<sup>4</sup> Stipulations to vary the law merchant in respect to obligations arising on a bill of lading must be in writing signed by the parties.<sup>5</sup>

It is no longer open to question, that in the absence of fraud or imposition, the rights of the carrier and shipper not involving negligence of the carrier, are controlled by a contract in writing delivered to the shipper by the carrier at the time of the receipt of the property for transportation.<sup>6</sup> When the special contract is proved, the shipper cannot rely on the common law liability of the carrier.<sup>7</sup> The owner of the goods may rely upon the responsibility imposed by the common law; but if he voluntarily agrees to a stipulation for exemption from liability, which does not cover losses from negligence or misconduct, it may be recognized and enforced.<sup>8</sup> The only remedy of the shipper in

<sup>1</sup> *Manning v. Hoover*, Abb. Adm. 188; *McCready v. Holmes* (S. C.) 6 Am. L. Reg. 229; *The Columbo*, 3 Blatchf. 521; *Hunt v. Mississippi Cent. R. Co.* 29 La. Ann. 446; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380.

<sup>2</sup> *Nelson v. Woodruff*, 66 U. S. 1 Black, 156, 17 L. ed. 97; *Turner v. The Black Warrior*, 1 McAll. 181; *Lamb v. Parkman*, 1 Sprague, 343; *The Tun Bark Case*, 1 Brown, Adm. 154; *The Oriflamme*, 1 Sawy. 176; *The Maggie Hammond*, 76 U. S. 9 Wall. 459, 19 L. ed. 780; *The Olbers*, 3 Ben. 150; *Arend v. Liverpool, N. Y. & P. SS. Co.* 64 Barb. 118; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Ellis v. Willard*, 9 N. Y. 529; *Keith v. Amende*, 1 Bush, 455; *Richards v. Doe*, 100 Mass. 524.

<sup>3</sup> *Butler v. The Arrow*, Newb. 59; *Bradley v. Dunipace*, 1 Hurlst. & C. 521.

<sup>4</sup> *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804; *Vanderwater v. Mills*, 60 U. S. 19 How. 82, 15 L. ed. 554.

<sup>5</sup> *Britton v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177; *The Bird of Paradise*, 72 U. S. 5 Wall. 562, 18 L. ed. 666; *How v. Kirchner*, 11 Moore, P. C. 21; *Kirchner v. Venus*, 12 Moore, P. C. 384.

<sup>6</sup> *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Perry v. Thompson*, 98 Mass. 249; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *Pendergast v. Adams Exp. Co.* 101 Mass. 120; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63; *Kallman v. United States Exp. Co.* 3 Kan. 205.

<sup>7</sup> *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

<sup>8</sup> *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170.

case of loss is to sue for the breach of the special contract.<sup>1</sup> If the shipper ignores the contract and sues upon the common law liability, he will, on proof of the special contract, be nonsuited.<sup>2</sup> An express receipt delivered at the time of shipment, is a contract.<sup>3</sup> So, a "domestic bill of lading" delivered to a shipper, is a contract whose terms are binding on both parties.<sup>4</sup> It must be construed according to its terms, like any other contract.<sup>5</sup> Thus "terra cotta busts" were held not to be "statuary" within the meaning of a carrier's contract.<sup>6</sup>

A contract of shipment with exemptions, made after injury to property, but containing no release from past liability, does not relieve the carrier from such liability.<sup>7</sup>

The rules which control the effect of written contracts, apply of course, to bills of lading; and the effect given to such contract in law is equally binding and conclusive, whether it be the result of an express stipulation, or one implied from the character of the instrument. The obligation implied by law from the language employed, is as much part of the contract, as though what the law implies has been fully expressed in words.<sup>8</sup>

<sup>1</sup> *Shaw v. York & N. M. R. Co.* 13 Q. B. 347; *Austin v. Manchester, S. & L. R. Co.* 15 Jur. 670; *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567.

<sup>2</sup> *Latham v. Rutley*, 2 Barn. & C. 20; *Austin v. Manchester, S. & L. R. Co.* 15 Jur. 670; *Davidson v. Graham*, 2 Ohio St. 131; *Ferguson v. Cappeau*, 6 Harr. & J. 394; *Stump v. Hutchinson*, 11 Pa. 533.

<sup>3</sup> *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224.

<sup>4</sup> *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Westcott v. Furgo*, 6 Lans. 319; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288. See also *Magnin v. Dinsmore*, 56 N. Y. 168; *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 125; *Breese v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Young v. Western U. Teleg. Co.* 65 N. Y. 163, cited in *Wheeler*, Carr. 237.

<sup>5</sup> *Bradstreet v. Heran*, Abb. Adm. 209; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151; *Barrett v. Rogers*, 7 Mass. 297, 5 Am. Dec. 45; *Hastings v. Pepper*, 11 Pick. 42; *Price v. Powell*, 3 N. Y. 322; *Ellis v. Willard*, 9 N. Y. 529; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 601, 20 L. ed. 783; *McMillan v. Michigan, S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 203; *Creery v. Holly*, 14 Wend. 26; *White v. Missouri Pac. R. Co.* 19 Mo. App. 400; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422; *Turner v. St. Louis & S. F. R. Co.* 20 Mo. App. 632.

<sup>6</sup> *Sutton v. Ciceri*, L. R. 15 App. Cas. 144.

<sup>7</sup> *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23.

<sup>8</sup> *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87.

All contracts have imported into them legal principles which can no more be varied by parol evidence, than the strongest and clearest expressed stipulation. Undoubtedly, necessary implication is as much part of an instrument, as if that which was implied was plainly expressed.<sup>1</sup> Where the shipper of a carload of horses who received the bill of lading, in which no route was designated by which the cargo was to be forwarded after leaving the initial carrier's line, offered to prove that a particular line had been agreed upon, it was held that the silence of the bill of lading in respect to the route was the same in legal effect as if a provision had been inserted therein authorizing the first carrier to select at its discretion, any customary or usual route, which was regarded as safe and responsible, by which to forward the car, and that the provision thus imported into the bill of lading was no more subject to be assailed by parol than were any express terms of the contract.<sup>2</sup> The cases which affirm this principle are very numerous. They proceed upon the theory that, in the absence of express stipulation, certain terms are annexed to every contract by legal implication, and that stipulations thus imported into the contract become as effectually a part of the written agreement as though they were expressed therein in terms.<sup>3</sup> Where a bill of lading specifies the rate per 100 pounds to be paid for goods carried but does not state their weight, which was readily ascertainable, the sum to be paid is sufficiently specified to accomplish the object of an act whose purpose was to prevent a railroad from charging a greater sum for the transportation of freight than is specified in the bill of lading.<sup>4</sup> Where the bill of lading fails to state the amount of freight, the law supplies, by implication, that

<sup>1</sup> *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276, 288, 19 L. ed. 349, 353; *Tisloe v. Graeter*, 1 Blackf. 353; *Hull v. Butler*, 7 Ind. 267; *Jones v. Clark*, 9 Ind. 341; *McKernan v. Mayhew*, 21 Ind. 291; *Foulks v. Falls*, 91 Ind. 315.

<sup>2</sup> *Snow v. Indiana, B. & W. R. Co.* 100 Ind. 422.

<sup>3</sup> *White v. Ashton*, 51 N. Y. 280; *Hinckley v. New York Cent. & H. R. R. Co.* 56 N. Y. 429; *Sinkins v. Norwich & N. L. S. B. Co.* 11 Cush. 102; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276, 285, 19 L. ed. 349-352; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163.

<sup>4</sup> *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291.

it must be the amount usually charged for such freight, and completes the contract, and parol evidence is inadmissible to vary, control, or contradict the terms therein expressed, or those which the law certainly implies, in the absence of fraud or mistake.<sup>1</sup>

An apparent exception to the general rule occurs where proof of an agreement collateral to that contained in the bill of lading is offered.<sup>2</sup> And the bill of lading and shipping note when executed at the same time, and simultaneously delivered, and relating to the same matter, constitute one agreement.<sup>3</sup> Cross-ties were shipped and all the bills of lading contained a stipulation to the effect that cross-ties were to be transported over the defendant's road and that they were to be delivered as therein specified upon payment of freight and charges in par funds. In some of them the amount to be paid is not fixed, while in others the charges actually collected were inserted in the bills of lading before they were delivered and before the ties were transported. Plainly there can be no ground of recovery back of the sum paid, where the amount actually collected was stipulated in the bills of lading beforehand, and it is not competent to give evidence of an oral agreement concerning the amount of freight to be paid, with a view of establishing a right of recovery in respect to those bills of lading in which the amount is not fixed in express terms. The bills of lading must be regarded as either complete contracts into which all the early negotiations of the parties are merged, or they are entirely without force or effect as evidence of the terms and conditions upon which goods were to be transported. While it is true that the contract of a common carrier to transport goods is equally binding whether it be by parol or in writing,<sup>4</sup> there is no reason to support a rule which should declare that part of the contract might be in writing, and part covering the same subject-

<sup>1</sup> *Pemberton Co. v. New York Cent. R. Co.* 104 Mass. 144; *Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518; *Jeffersonville, M. & I. R. Co. v. Worland*, 50 Ind. 339; *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 352.

<sup>2</sup> *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77.

<sup>3</sup> *Jennings v. Grand Trunk R. Co.* 52 Hun, 227.

<sup>4</sup> *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527.



matter by parol. Either the bill of lading must be regarded as the sole repository of the agreement of the parties in special terms upon which the shipments were made, or it must be regarded as a receipt and nothing more. As a contract, the bill of lading, like other written contracts, is presumed, in the absence of imposition or mistake, to embody the entire agreement of the parties.<sup>1</sup>

### § 26. *Fraud or Mistake in Bill of Lading.*

A statute declaring the liability of a carrier on bills of lading, does not give validity to stipulations therein which are the result of fraud or mistake. A statement made fraudulently or by mistake in a bill of lading, representing the weight of freight to be less than it is in fact, will not prevent the carrier from recovering for the whole amount carried, according to the rate per hundred pounds stated in the bill.<sup>2</sup> The shipper is not bound by a clause on the back of the shipping bill, which, apparently by inadvertence, was not struck out, or adapted to the terms of the special contract.<sup>3</sup> One of several independent steamers, constituting a certain well known line belonging to different owners who are not interested in the business of any vessels except their own, which fails to take all the cotton specified in bills of lading given by the agent of the line, where the bills for the whole quantity were made out in the name of that vessel in exchange for shipping receipts which, by mistake of the employes of such agent, named that vessel instead of giving the agent an option between that and the vessel next following, as agreed on in a contract for shipment between the agent and the owner of the cargo,—is not liable for loss on account of a fall in the market price before the arrival of the next vessel, but is liable for the premium paid for insurance on the cotton which was not actually carried.<sup>4</sup> A receipt executed by a railway agent several months

<sup>1</sup> *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 352; *Long v. New York Cent. R. Co.* 50 N. Y. 76.

<sup>2</sup> *Baird v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 592, 42 Am. & Eng. R. Cas. 281.

<sup>3</sup> *Jennings v. Grand Trunk R. Co.* 52 Hun, 227.

<sup>4</sup> *Crenshaw v. Pearce*, 43 Fed. Rep. 803.

after the goods for which it was given were delivered,—especially if litigation is then contemplated or has become probable—is not evidence to affect the company, unless special authority in the agent is shown.<sup>1</sup>

To sustain a defense at law, that defendant was induced to sign by fraudulent representations, the only fraud permissible to be proved is fraud touching the execution of the instrument.<sup>2</sup> Where the signature to a contract was obtained through fraudulently false representations of its contents, the defense of fraud may be set up in an action based upon the contract. *Non est factum* could have been pleaded at common law.<sup>3</sup> “Fraud” is the term which the law applies to certain facts; and where upon the facts the law adjudges fraud, it is not essential that the complaint should in terms allege it. It is sufficient if the facts stated amount to a case of fraud.<sup>4</sup> Fraud or circumvention, which a statute embodying a rule of common law allows as a defense to written instruments against the guilty party or an assignee, is not that which goes merely to the consideration, but to the execution or making; and there must be a trick or device by which one kind of instrument is signed in belief that it is another kind, or the amount or nature or terms of the instrument must be misrepresented.<sup>5</sup> When one of two contracting parties is fraudulently induced to execute a written instrument upon the false representation that it expresses the agreement which they have made, the party defrauded may defend against the enforcement of the fraudulent instrument by the other party, even though he may be chargeable with want of prudence in relying upon the false representations. This defense may also be made when a third party, for whose benefit the contract was made, seeks to enforce it.<sup>6</sup>

<sup>1</sup> *Hematite Min. Co. v. East Tennessee, V. & G. R. Co.* (Ga.) July 17, 1893.

<sup>2</sup> *George v. Tate*, 102 U. S. 564, 26 L. ed. 232; *Hartshorn v. Day*, 60 U. S. 19 How. 212, 15 L. ed. 605; *Osterhout v. Shoemaker*, 3 Hill, 513; *Belden v. Davies*, 2 Hall, 433; *Franchot v. Leach*, 5 Cow. 506.

<sup>3</sup> *Van Valkenburgh v. Rouk*, 12 Johns. 337; *Stacy v. Ross*, 27 Tex. 3, 84 Am. Dec. 604; *Foster v. Mackinnon*, L. R. 4 C. P. 704; *Vorley v. Cooke*, 1 Giff. 230.

<sup>4</sup> *Stinson v. Helps*, 9 Colo. 33; Kerr, *Fraud & Mistake*, 366; 2 *Estee*, Pl. 423.

<sup>5</sup> *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323; *Shipley v. Carroll*, 45 Ill. 285; *Elliott v. Larings*, 54 Ill. 213; *Maxey v. Williamson County Ct.* 72 Ill. 207.

<sup>6</sup> *Marfield v. Schwartz*, 10 L. R. A. 606, 43 Minn. 221.

Where the written instrument has not passed from the hands of the original holder, it does not lie in his mouth to say that the defendant was not in law defrauded, because he was careless in trusting to the representations made which induced its execution.<sup>1</sup> Where the parties to a transaction do not stand on an equal footing, one induced to act to his prejudice by fraudulent representation of the other, is not precluded from recovering damages because he did not prosecute diligent inquiry as to the truth or falsity of the representations.<sup>2</sup> But a party on equal footing, who refuses to make diligent inquiry and exercise his own judgment, cannot complain that the other party practiced fraud upon him.<sup>3</sup> It is inexpedient upon grounds of public policy that a solemnly executed instrument should be set aside upon the ground of fraud, unless equitable and proof of the fraud be clear and strong.<sup>4</sup>

### § 27. *Bill of Lading Should be Delivered.*

Shippers should in all cases require a bill of lading, which should be signed by the carrier; or when the carriage is by water by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. The terms of a bill of lading not signed by or delivered at the time of shipment to the shipper or his authorized agent, are binding upon him when it is subsequently sent to a third person who indorses it over to him, and he enters the goods at the custom house thereon.<sup>5</sup> Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consign-

<sup>1</sup> *Mackey v. Peterson*, 29 Minn. 298, 43 Am. Rep. 211; *Cole v. Williams*, 12 Neb. 440; *Nebeker v. Cutsinger*, 48 Ind. 436; *Spurgin v. Traub*, 65 Ill. 170.

<sup>2</sup> *Cottrill v. Krum*, 100 Mo. 398; *Wannell v. Kem*, 57 Mo. 478; *Bigelow*, Fr. 534.

<sup>3</sup> *First Nat. Bank of Cheyenne v. Swan* (Wyo.) Feb. 5, 1890.

<sup>4</sup> *Cannon v. Jackson*, 40 Ark. 417; *Parlin v. Small*, 68 Mo. 290; *Brown v. Blunt*, 72 Me. 415; *Martin v. Berens*, 67 Pa. 459. False representation, see notes to *Nounnan v. Sutter County Land Co.* (Cal.) 6 L. R. A. 219; *Tuppan v. Albany Brewing Co.* (Cal.) 5 L. R. A. 428; *Dave v. Morris* (Mass.) 4 L. R. A. 158; *Finlayson v. Finlayson* (Or.) 3 L. R. A. 801; *Davis v. Nuzum* (Wis.) 1 L. R. A. 774.

<sup>5</sup> *Rubens v. Ludgate Hill S. S. Co.* 48 N. Y. S. R. 732.

ment is delivered, the master, upon those receipts being given up, will sign two or three, or, if requested, even four bills of lading in the usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent, or factor, and he should always retain one for his own use. Where bills of lading are executed in triplicate in shipments by water, those retained by the shipper and his consignee control the triplicate which remains in possession of the master.<sup>1</sup> The indorsee of first set obtains title as against subsequent indorsee of the others.<sup>2</sup> And the same rule applies as to duplicates, the one delivered by the carrier being accepted in preference to the one retained, which has only the authority of a memorandum.<sup>3</sup>

Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport and right delivery of the same, upon the terms as to freight, therein described, the extent of the obligation being specified in the instrument. Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination, unless he can prove that the loss happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any congressional legislation upon the subject, he is in the nature of an insurer, and liable, in all events and for every loss and damage, however occasioned, unless

<sup>1</sup> *The Thames v. Seaman*, 81 U. S. 14 Wall. 105, 20 L. ed. 805.

<sup>2</sup> *The Tigress*, Brown & L. 38; *Glyn v. East & West India Dock Co.* L. R. 5 Q. B. Div. 129; *Meyerstein v. Barber*, L. R. 2 C. P. 38, L. R. 4 Eng. & Ir. App. 317.

<sup>3</sup> *Ontario Bank v. Hanlon*, 23 Hun, 283.

it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.<sup>1</sup>

If the master has received a cargo on board he is bound to prepare and sign a bill of lading, or to put it ashore again at the ship's expense; otherwise, for his neglect, he and the owners may be liable for a conversion. Where no demurrage is due, a proper bill of lading should be made out, and the refusal or neglect of the master to give such an one, is a violation of shipper's legal right for which they are entitled to at least nominal damages. If demurrage is due, a proper bill of lading should be endorsed with protest and claim for demurrage.<sup>2</sup> Such a contract is to be construed, like all other written contracts, according to the legal import of its terms. It becomes the sole evidence of an undertaking, and all antecedent agreements are extinguished by the writing.<sup>3</sup>

The obligation of the carrier extends only to acknowledge the receipt of the goods and the engagement to carry and deliver them.<sup>4</sup> The owners are bound by the bill of lading, although the master does not add "master" to his signature.<sup>5</sup> But statements, although by an agent of a carrier, as to the contents of a record kept by the company, is inadmissible in evidence against it, where it relates to transactions long past, and the furnishing thereof is not within the scope of the agent's employment.<sup>6</sup> Shippers of goods by vessel, in the absence of notice of a charter party, have a right to assume that her captain and acting

<sup>1</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 23, 16 L. ed. 46; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Elliott v. Russell*, 10 Johns. 7; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>2</sup> *Paterson v. Dakin*, 31 Fed. Rep. 682.

<sup>3</sup> *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Southern Exp. Co. v. Dickson*, 94 U. S. 549, 24 L. ed. 285; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475.

<sup>4</sup> *The May Flower*, 3 Ware, 300; *Perkins v. Hill*, 2 Woodb. & M. 158, 1 Sprague, 123.

<sup>5</sup> *Fox v. Holt*, 36 Conn. 558.

<sup>6</sup> *Hematite Min. Co. v. East Tennessee, V. & G. R. Co.* (Ga.) July 17, 1893.

agents of the charterer at the port of shipment, have authority to bind the owner by signing bills of lading.<sup>1</sup> A railroad company is liable for the penalty prescribed by Tex. Rev. Stat. 1879, art. 280, for a failure and refusal to give upon demand a proper bill of lading of lumber shipped, where the bill of lading delivered by it for the lumber shipped described it merely as a carload, whereas the shipper demanded the weight of the lumber.<sup>2</sup> A railway company is liable for the value of cotton delivered to it and in its custody by virtue of a contract of shipment, that is destroyed by its negligence, even though it has given no bill of lading therefor.<sup>3</sup>

A railroad company which makes one of a firm, which is almost the only consignee of goods delivered at a station, its agent at such station, charged with the responsibility of the business as between the company and the firm, and allows such business to be carried on for years in the office of the firm away from the station, without precaution to see that bills of lading for goods are canceled, —is liable to an innocent purchaser of a bill of lading for goods consigned to such firm, which have been delivered to it without surrender of the bill of lading, and upon bills of lading fraudulently issued by such agent.<sup>4</sup> Persons paying for goods on the faith of bills of lading issued by a carrier to their agents, occupy towards such carrier the position of bona fide purchasers.<sup>5</sup>

A master of a vessel cannot be required to state in his bills of lading the precise chemical character of the cargo, his authority being to bind his owners with regard to the weight, condition, and value of the goods, but not to estimate and state the particular mercantile quality of the goods before they are put on board. Since "dry phosphate rock" has two significations, one having reference to its commercial qualities, ascertained only by chemical analysis, and the second solely to its condition observable by the senses, a master of a vessel has a right to refuse to sign a bill of lading for

<sup>1</sup> *Baumroll Manufactur Von Scheibler v. Gilchrest* [1891] 2 Q. B. 310.

<sup>2</sup> *Texas & P. R. Co. v. Cuteman* (Tex. App.) Oct. 16, 1889.

<sup>3</sup> *Martin v. Ft. Worth & D. C. R. Co.* 3 Tex. Civ. App. 556.

<sup>4</sup> *Walters v. Western & A. R. Co.* 56 Fed. Rep. 369.

<sup>5</sup> *The H. G. Johnson*, 48 Fed. Rep. 696.

"dry phosphate rock," without any qualification to indicate condition, but not to refuse to sign for anything else but "phosphate rock," without any statement of its condition.<sup>1</sup>

§ 28. "*Contents and Value Unknown*"—"Weight Unknown"—"*More or Less*."

It may be stated as the general rule that the common carrier is not responsible for the difference in the quality of goods carried, as compared with that delivered in the bill of lading, if he safely delivers the very goods received by him for transportation. A bill of lading is at once a receipt and a contract; it is the acknowledgment of the receipt of the property, and the contract to carry safely and deliver. But, under the clause "Weight Unknown," a statement of the amount in the bill of lading, is not even prima facie evidence against the carrier, when it appears that all received was in fact delivered.<sup>2</sup> Where a shipment of cotton, in advance of its separation from the mass of bales, was receipted for in advance, reciting the receipt of the bales as. "Contents unknown, Marked and Numbered as per Margin," and the bill of lading with a draft attached, was paid to the consignee, the fact that the cotton did not correspond in quality with the marks on the bill of lading, does not justify the consignee in refusing to accept and sell them, on account of the carrier.<sup>3</sup> The insertion of the words "Contents Unknown," expressly exonerates the carrier from all liability in regard to the quality of the goods carried; and it cannot be held liable for nondelivery of a quality corresponding with that described in the bill of lading, where the actual article is thus delivered.<sup>4</sup>

Where a bill of lading acknowledges the receipt of "the follow-

<sup>1</sup> *The Kate V. Aitkin*, 39 Fed. Rep. 328.

<sup>2</sup> *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. Rep. 36; *Lebeau v. General Steam Nav. Co.* L. R. 8 C. P. 88; *The Peter Der Grosse*, L. R. 1 Prob. Div. 414.

<sup>3</sup> *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077.

<sup>4</sup> *St. Louis, I. M. & S. R. Co. v. Knight*, *supra*; *Haddon v. Parry*, 3 Taunt. 303; *Jessel v. Bath*, L. R. 2 Exch. 267; *Clark v. Barnicell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *The Columbo*, 3 Blatchf. 521; *Bissel v. Price*, 16 Ill. 408; *Barrett v. Rogers*, 7 Mass. 297, 5 Am. Dec. 45; *Shepherd v. Naylor*, 5 Gray, 591; *Miller v. Hannibal & St. J. R. Co.* 90 N. Y. 430, 43 Am. Rep. 179.

ing described packages" in apparent good order ("Contents and value unknown") it imports only that the defendant had received the number of packages mentioned, which purports to contain the property thereafter mentioned in the receipt. And, where advances are made upon the shipment, the party making the advances is chargeable with knowledge of the contents of the bill of lading, and must be held to have relied, not upon the admission in the bill of lading, but upon the assurances of the shipper, as to the contents of the packages.<sup>1</sup> So where "weight unknown" precedes the carrier's signature, it will control the statement preceding it of the weight.<sup>2</sup> A bill of lading for 400 pine piles "more or less," expressly made subject to a charter-party which, on its part, showed that no definite number was agreed to be carried, will prevent a consignee who has accepted drafts drawn on 400 piles, from claiming damages for a deficiency where the vessel carried all that the charter-party required.<sup>3</sup>

### § 29. *Assignment of Bill of Lading.*

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decision. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of bona fide purchasers only applies to it in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is

<sup>1</sup> *Miller v. Hannibal & St. J. R. Co.* 90 N. Y. 430, 43 Am. Rep. 179, reversing 24 Hun, 607; *Haddow v. Parry*, 3 Taunt. 303.

<sup>2</sup> *Shepherd v. Naylor*, 5 Gray, 591; *Jessel v. Bath*, L. R. 2 Exch. 267.

<sup>3</sup> *The Dixie*, 46 Fed. Rep. 403.



an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.<sup>1</sup> Bills of lading represent the goods they call for, and a delivery of the bill of lading is equivalent to a constructive delivery of the goods themselves; as they thus represent a delivery of the goods, they differ from contracts which are merely assignable.<sup>2</sup> When the bill of lading is transferred and delivered as collateral security, the rights of the pledgee under it are the same as those of an actual purchaser, so far as the exercise of those rights is necessary to protect the holder.<sup>3</sup> A bank which makes advances on a bill of lading, has a lien to the extent of the advances on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee cannot appropriate the property or its proceeds to his own use in payment of a prior debt.<sup>4</sup>

Verbal mortgage or pledge of goods accompanied by a delivery, is good, at least as against the consignee to receive and sell the goods and to whom they are shipped, but who did not advance any money on account of the shipment. A consignee who had notice that a draft had been drawn by the owner against the goods

<sup>1</sup> *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, 38 L. ed. 944; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998. See *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455.

<sup>2</sup> *Meyerstein v. Barber*, L. R. 2 C. P. 42; *Hazard v. Fiske*, 83 N. Y. 287; *Tilden v. Minor*, 45 Vt. 196; *Dodge v. Meyer*, 61 Cal. 405; *Robinson v. Stuart*, 68 Me. 61; *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 198; *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107.

<sup>3</sup> *Means v. Bank of Randall*, 146 U. S. 620, 36 L. ed. 1107; *Halsey v. Warden*, 25 Cal. 128; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Dows v. National Exch. Bank of Milwaukee*, 91 U. S. 618, 23 L. ed. 214; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 333; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Holmes v. German Security Bank*, 87 Pa. 525.

<sup>4</sup> *Means v. Bank of Randall*, *supra*; *Conard v. Atlantic Ins. Co. of N. Y.* 26 U. S. 1 Pet. 386, 7 L. ed. 189; *Gibson v. Stevens*, 49 U. S. 8 How. 384, 12 L. ed. 1123, 3 Parsons, Cont. 487.

consigned, and had been indorsed to the plaintiff, and this several hours before the goods were sold by the consignee, does not occupy the position of an innocent purchaser of the goods.<sup>1</sup> But bills of lading are not commercially negotiable instruments like bills of exchange.<sup>2</sup> As the bill of lading represents goods, and as no title passes to the receiver or purchaser of goods lost or stolen, even to a bona fide purchaser; so the bill of lading,—a symbol of the goods—can, when lost or stolen, have no effect in transferring title to what it symbolizes; although the true owner may, by his negligence, put it into the power of another to so represent himself as the owner and clothe himself with apparent title, as to estop the true owner from denying the pretended title.<sup>3</sup> An indorsement of a bill of lading without the authority, consent or knowledge of the owner of the goods, transfers no title even to an indorsee in good faith. An indorser having no title to the goods cannot convey any.<sup>4</sup>

If possession of goods be given for a specific purpose, as to a carrier or wharfinger, the property is not changed by the sale of such a bailee, and the owner may recover them even from the bona fide buyer.<sup>5</sup> An agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power.<sup>6</sup> But where the holder of a bill of lading transfers it, intending to pass the title, such transfer will be effective although procured by fraudulent misrepresentation.<sup>7</sup>

An indorsement or written transfer of a bill of lading is not necessary. Delivery, with intent to pass title to the goods, is sufficient. The possession of a bill of lading, whether indorsed or

<sup>1</sup> *Means v. Bank of Randall*, *supra*.

<sup>2</sup> *Stollenwerck v. Thacher*, 115 Mass. 224.

<sup>3</sup> *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991; *Shaw v. Merchant's Nat. Bank of St. Louis*, 101 U. S. 557, 25 L. ed. 892.

<sup>4</sup> *Brooker v. Peabody*, 13 N. Y. 121; *Dows v. Perrin*, 16 N. Y. 325; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *Tison v. Howard*, 57 Ga. 410; *Decan v. Shipper*, 35 Pa. 239, 78 Am. Dec. 334.

<sup>5</sup> *Wilkinson v. King*, 2 Campb. 335.

<sup>6</sup> *Munn v. Commission Co.* 15 Johns. 44, 8 Am. Dec. 219; *Beals v. Allen*, 18 Johns. 363, 9 Am. Dec. 221; *Thompson v. Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Andrews v. Kueeland*, 6 Cow. 354; *Blane v. Proudfit*, 3 Call. 207.

<sup>7</sup> *Dows v. Greene*, 24 N. Y. 638.

not, is prima facie evidence of title as against any person not showing a better title.<sup>1</sup> The bill of lading passes the property when it is indorsed and intended so to operate, in the same manner as a direct delivery of the goods would do if so intended; and it operates no further.<sup>2</sup> By the custom of merchants, bills of lading are transferable by indorsement and delivery so as to pass the title to the goods as effectually as if the goods were delivered, so long as they are in transit.<sup>3</sup> A mere indorsement of a bill of lading, without a delivery thereof, does not transfer the property in the goods.<sup>4</sup> The assignment of a bill of lading bona fide and for value, will vest the legal interest of the consignee in the assignee, although made after the arrival of goods.<sup>5</sup> A bill of lading is transferable by the custom of merchants so as to vest the title of the assignor in the transferee. Consignee may transfer a bill of lading by indorsement.<sup>6</sup> Still a bill of lading is not at common law technically negotiable, like a bill of exchange.<sup>7</sup>

<sup>1</sup> *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Tisson v. Howard*, 57 Ga. 410; *Glidden v. Lucas*, 7 Cal. 26; *Pratt v. Parkman*, 24 Pick. 42; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Fifth Nat. Bank of Chicago v. Bayley*, 115 Mass. 228; *Allen v. Williams*, 12 Pick. 297; *Low v. De Wolf*, 8 Pick. 101; *City Bank v. Rome, W. & O. R. Co.* 44 N. Y. 136; *Merchant's Bank of Canada v. Union R. & Transp. Co.* 69 N. Y. 373; *Bates v. Stanton*, 1 Duer, 85; *Indiana Nat. Bank v. Colgate*, 4 Daly, 41; *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

<sup>2</sup> *Newson v. Thornton*, 6 East, 41; *Gardner v. Howland*, 2 Pick. 599; *Mears v. Waples*, 3 Houst. (Del.) 582; *Empire Transp. Co. v. Steele*, 70 Pa. 190; *Brower v. Peabody*, 13 N. Y. 121; *Indiana Nat. Bank v. Colgate*, 4 Daly, 41.

<sup>3</sup> *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. 848, and note, 2 T. R. 63; *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804; *Shaw v. Merchants Nat. Bank of St. Louis*, 101 U. S. 557, 25 L. ed. 892; *Pease v. Gloahec*, L. R. 1 C. P. 219; *Meyerstein v. Barber*, L. R. 2 C. P. 45, L. R. 4 Eng. & Ir. App. 317; *Union R. & Transp. Co. v. Yeager*, 34 Ind. 1; *Robinson v. Stuart*, 68 Me. 61; *Halliday v. Hamilton*, 78 U. S. 11 Wall. 510, 20 L. ed. 214; *Crapo v. Kelly*, 83 U. S. 16 Wall. 610, 21 L. ed. 430; *Gibson v. Stevens*, 3 McLean, 562; *Walter v. Ross*, 2 Wash. C. C. 287; *United States v. Delaware Ins. Co.* 4 Wash. C. C. 422; *Holbrook v. Wight*, 24 Wend. 169, 35 Am. Dec. 607; *Atlantic Ins. Co. v. Conard*, 4 Wash. C. C. 676; *Marsh v. Pedder*, Holt, 74; *Webb v. Anderson*, Taney, 512; *Sumner v. Hamlet*, 12 Pick. 76; *Pratt v. Parkman*, 24 Pick. 42; *Cudwell v. Bull*, 1 T. R. 205; *Brand v. Lisle*, Yelv. 164; *Wright v. Campbell*, 4 Burr. 2046; *Wood v. Roach*, 2 U. S. 2 Dall. 180, 1 L. ed. 340.

<sup>4</sup> *Buffington v. Curtis*, 15 Mass. 527, 8 Am. Dec. 115.

<sup>5</sup> *Chandler v. Belden*, 18 Johns. 157, 9 Am. Dec. 193; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163.

<sup>6</sup> *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541; *Newhall v. Central Pac. R. Co.* 51 Cal. 350, 21 Am. Rep. 713; *Walter v. Ross*, 2 Wash. (C. C.) 283.

<sup>7</sup> *Hale v. Milwaukee Dock Co.* 29 Wis. 482, 9 Am. Rep. 603; *Pattison v. Culton*,

The statute of a state making bills of lading negotiable, means that they may be transferred by indorsement and delivery, so as to give to the indorsee the right to sue on them in his own name; but it does not charge the negotiator of them with all the consequences which follow the negotiation of bills or notes. It is only a legislative sanction given to the commercial law of universal application, that a bill of lading, legally transferred, gives title to the property it represents.<sup>1</sup> No statute is to be construed as altering the common law, further than its words plainly import. The purchaser of a bill of lading, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and is not entitled to hold the merchandise covered by the bill against its true owner.<sup>2</sup> Where, however, such a construction had been placed upon the state statute, and subsequent legislation having, in view of such decision, declared that they should be negotiable, so as to vest title unaffected by any rights or equities between prior holders, having no actual notice thereof,—such statute will be effective, and the courts must recognize the legislative intent and execute it.<sup>3</sup>

### § 30. “Order” or “Assign” in Bill of Lading.

It is settled by the decisions in New York, that the words to “order” or “assign” are not necessary for the passing of a title of a bill of lading,<sup>4</sup> although this is not uniformly admitted.<sup>5</sup>

Where, as between buyer and seller, the title may be changed by transfer of the bill of lading, it does not follow that the

33 Ind. 240, 5 Am. Rep. 199; *Howard v. Shepherd*, 9 C. B. 297; *Thompson v. Dominy*, 14 Mees. & W. 403; *Tison v. Howard*, 57 Ga. 410; *Dows v. Greene*, 24 N. Y. 638; *Stollenwerk v. Thacher*, 115 Mass. 224.

<sup>1</sup> *First Nat. Bank of Starksville v. Meyer*, 43 La. Ann. 1.

<sup>2</sup> *Shaw v. Merchants' Nat. Bank of St. Louis*, 101 U. S. 557, 25 L. ed. 892; *Gurney v. Behrend*, 3 El. & Bl. 623.

<sup>3</sup> *Tiedeman v. Knorr*, 53 Md. 612.

<sup>4</sup> *City Bank v. Rome, W. & O. R. Co.* 44 N. Y. 136.

<sup>5</sup> See 3 Kent, Com. \*207; Dan. Neg. Inst. § 1730. This distinction as to the effect of the words “order” and “assign” is noticed in *Bank of Batavia v. New York, L. E. & W. R. Co.* 33 Hun, 589. See *Robinson v. Memphis & C. R. Co.* 9 Fed. Rep. 129; *Blanchard v. Page*, 8 Gray, 281.

contract or liability of the carrier is changed. The carrier is entitled to treat the consignee, in the absence of any advice to the contrary, as the owner.<sup>1</sup> The words to "order" or "assign" are not to be treated as insignificant. They are words, the presence or absence of which are often held to determine the negotiability of instruments.<sup>2</sup> And, where the goods are shipped to the order of the shipper or the consignee, the one claiming the goods, if not the consignee, must produce such order properly indorsed upon the bill of lading. Where the shipper makes the goods transferable to his order, he reserves the property in himself and it can only be divested in the manner indicated, to relieve the carrier from responsibility.<sup>3</sup>

### § 31. *Bill of Lading with Draft Attached.*

Bills of lading in this form are often used for the purpose of raising money, and frequently the bill of lading has a draft attached to it; and such drafts are discounted and the bills of lading indorsed to secure the payment. The document the shipper receives, is a muniment of title quasi negotiable, and on the faith of which he may borrow money; it is a contract and not merely a receipt.<sup>4</sup> The pledgee of a bill of lading as security for a bill of exchange drawn on the consignee has a valid common law title to the goods, independent of the English Bills of Lading Act, entitling him to sue the shipowner for damages for the nondelivery of the goods on presentation of the bill of lading, after the consignee's default; and it is no defense that they are not in such

<sup>1</sup> *Bailey v. Hudson River R. Co.* 49 N. Y. 70; *Sweet v. Barney*, 23 N. Y. 335; *Hotchkiss v. Artisan's Bank*, 2 Abb. App. Dec. 403; *O'Dougherty v. Boston & W. R. Co.* 1 Thomp. & C. 477; *Krulder v. Ellison*, 47 N. Y. 37, 7 Am. Rep. 402; *Fitzhugh v. Wiman*, 9 N. Y. 559; *Everett v. Sultus*, 15 Wend. 475.

<sup>2</sup> *Dan. Neg. Inst.* § 105; *Mechanics Bank v. Struilton*, 3 Keyes, 365; *Forbes v. Boston & L. R. Co.* 133 Mass. 154.

<sup>3</sup> *Pennsylvania R. Co. v. Stern*, 119 Pa. 24, *Libby v. Ingalls*, 124 Mass. 503; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. ed. 287; *Watson v. Hoosac Tunnel Line Co.* 13 Mo. App. 263.

<sup>4</sup> *Logan v. Mobile Trade Co.* 46 Ala. 514; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Huntingdon v. Dinsmore*, 4 Hun, 66; *Long v. New York Cent. R. Co.* 50 N. Y. 76; *McMahon v. Macy*, 51 N. Y. 155; *Farnham v. Camden & A. R. Co.* 55 Pa. 53; *American Exp. Co. v. Second Nat. Bank of Titusville*, 69 Pa. 394, 8 Am. Rep. 268.

owner's possession, where he wrongfully delivered them to the consignee without requiring him to produce the bill of lading.<sup>1</sup> The transferee of bills of lading as security for the payment of a draft upon the consignee acquires a right of pledge, and therefore, in legal contemplation, has a valid constructive possession superior to that of the consignee or any other actual possessor of the goods, which continues until the goods pass into the hands of innocent third parties. A bona fide creditor of a consignor, who holds the latter's draft for value, to which bills of lading transferred in blank are attached to secure its payment, is to be deemed the owner of the goods so far as to give validity to the pledge created by the forwarder; and on presentation of the draft with the annexed bills to the consignee, before he has accepted the consignment, the creditor becomes entitled to the delivery of the property, on the payment of his draft by the consignee.<sup>2</sup>

Where the shipper attaches the bill of lading to a draft for the price; and indorses same to one who discounts the draft, the goods are thereby pledged for the payment of the draft, and a special property therein passes to the transferee.<sup>3</sup> The holder of a bill of lading indorsed to him as security for such draft, may replevin the goods or sue for conversion, where goods are delivered to consignee without payment of draft.<sup>4</sup> Possession obtained by a consignee of consigned goods, against which a draft has been drawn accompanied by a transfer of the bills of lading as security, after presentation of such draft with the bills attached by a bona fide creditor of the consignor, is unauthorized and unjustifiable.<sup>5</sup>

<sup>1</sup> *Bristol & West of England Bank v. Midland R. Co.* L. R. 2 Q. B. Div. 653.

<sup>2</sup> *First Nat. Bank of Starksville v. Meyer*, 43 La. Ann. 1.

<sup>3</sup> *Holmes v. German Security Bank*, 87 Pa. 525; *Holmes v. Bailey*, 92 Pa. 57; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Hathaway v. Haynes*, 124 Mass. 311; *Joslyn v. Grand Trunk R. Co.* 51 Vt. 92; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Indiana Nat. Bank v. Colgate*, 4 Daly, 41; *Commercial Bank of Keokuk v. Pfeiffer*, 22 Hun, 327; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Heiskell v. Farmers & M. Nat. Bank*, 89 Pa. 155, 33 Am. Rep. 745; *Farmers & M. Nat. Bank of Buffalo v. Hazeltine*, 78 N. Y. 104, 34 Am. Rep. 518.

<sup>4</sup> *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *Heiskell v. Farmers & M. Nat. Bank*, 89 Pa. 155, 33 Am. Rep. 745; *Stollenwerk v. Thacher*, 115 Mass. 224; *First Nat. Bank of Green Bay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92.

<sup>5</sup> *First Nat. Bank of Starksville v. Meyer*, 43 La. Ann. 1.

Where an invoice is sent to the purchaser, which states on its face that the goods are shipped with draft,—which draft is attached to the bill of lading—and sent with the collection, the exhibition by the purchaser to the carrier of the invoice, will not authorize the delivery of the goods without the presentation of the bill of lading.<sup>1</sup> Presentment to a consignee of indorsed bills of lading, with a draft upon the consignee, makes unnecessary any further notice from the consignor to the consignee of the drawing of the draft, or any instruction in regard thereto, as it proves conclusively that the consignor had parted with his interest by transferring the same to another.<sup>2</sup> A shipper of ice taking a bill of lading to his own order, under a contract with one who furnishes the vessel for transporting it, to sell it on a joint adventure and to pay a certain amount on a sight draft, cannot cut off the latter's rights, notwithstanding the nonpayment of the sight draft, by selling the ice to another and transferring the bill of lading.<sup>3</sup> A consignee of goods is not entitled to a preference for a balance of advances made by him to the consignor, over the claims of a holder of a draft to secure which bills of lading for the goods have been transferred by the consignor, when the goods were not shipped in payment of such advances.<sup>4</sup>

In the case of *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804, it appeared that the purchaser of cotton at Savannah delivered it there to a vessel to be carried to New York, taking bills of lading in which it was stated that the cotton was shipped by one Gilbert Van Pelt, and was to be delivered “unto order or to his or their assigns.” Van Pelt was a member of a firm in New York for which he purchased the cotton. Against the shipment he drew a draft on his firm, payable fifteen days after sight, and delivered it, with the bills of lading, to parties who obtained the discount of the draft from a bank in Atlanta. The draft and bills were at once forwarded to New York, to an

<sup>1</sup> *Pennsylvania R. Co. v. Stern*, 119 Pa. 24; *Dows v. National Exch. Bank of Milwaukee*, 91 U. S. 618, 23 L. ed. 214.

<sup>2</sup> *First Nat. Bank of Starksville v. Meyer*, 43 La. Ann. 1.

<sup>3</sup> *The Saugerties*, 44 Fed. Rep. 625.

<sup>4</sup> *First Nat. Bank of Starksville v. Meyer*, *supra*.

agent of the bank, to procure their acceptance by the firm. Before the draft became due, the vessel arrived at New York and gave notice to the firm of the arrival of the cotton. That vessel had previously brought cotton in the same way for the firm, and the master of the vessel, knowing that the cotton was intended for the firm, and having no information from the bank's agent, or from any other souree, or of any other consignee or claimant, delivered to it the cotton, taking its receipt. When the draft became due, two weeks afterwards, and was not paid, the cotton was demanded of the owner of the vessel by the bank's agent. In the action which followed, it was contended by the owner that the delivery was justified, and that the vessel had discharged its obligation; but the court held that, though the delivery had been made in ignorance of any outstanding claim to the cotton, it was nevertheless, a breach of the contract of affreightment, and that the agent of the bank could libel the vessel, which was bound for the proper delivery of the property, for the loss sustained.<sup>1</sup>

### § 32. "*Charges to be Collected*"—"C. O. D."

Where the carrier undertakes, not only to transport goods, but to collect from the consignee their value,—and it fails, upon tender to the consignee, to receive the payment demanded, it is its duty to notify the consignor of the goods, and when this is done, the responsibility as common carrier ends and the goods are held subject to the order of the consignor, but not before.<sup>2</sup> If there is an absolute refusal by the consignee to receive the goods, the carrier would be justified, if he so elected, in returning them at once, with this information to the consignor.<sup>3</sup> He is not bound, in any event, to repeat a tender.<sup>4</sup> But it will be the duty of the carrier to give the consignee reasonable time—if demanded—to prepare himself to accept and pay for the goods and freight.<sup>5</sup>

<sup>1</sup> *Hulsey v. Warden*, 25 Kan. 128; *Boatmen's Sav. Bank v. Western & A. R. Co.* 81 Ga. 221; *Furman v. Union Pac. R. Co.* 106 N. Y. 579.

<sup>2</sup> *American Merchants U. Exp. Co. v. Wolf*, 79 Ill. 430; *Adams Exp. Co. v. McConnell*, 27 Kan. 238.

<sup>3</sup> *Adams Exp. Co. v. McConnell*, *supra*.

<sup>4</sup> *Stoer v. Crowley*, McClel. & Y. 129.

<sup>5</sup> *Great Western R. Co. v. Crouch*, 3 Hurlst. & N. 183.



And the same rule applies, where an opportunity to inspect the goods is demanded. A carrier's contract to collect the money on goods shipped, before delivering to the consignee, is not broken, in the absence of express prohibition, by allowing the consignee to inspect the goods before acceptance; and the consignee's refusal upon inspection to accept the goods will not render the carrier liable to the shipper.<sup>1</sup> The carrier is justified in returning money paid by the consignee, where it has been used to perpetrate a fraud by sending a package “C. O. D.” with charges purporting to be the value of the article, where they are grossly in excess of the actual value, or the package is utterly valueless.<sup>2</sup>

The liability of the carrier, in case of losses by fire, after the goods arrive at their destination, is not in any way affected by the fact that it had undertaken the collection of their value for the consignor.<sup>3</sup> A bill of lading recited, that the goods “were to be delivered without delay, etc., at the port of, etc., to, etc., or assigns, as, he or their paying freight for said goods at the rate of, etc., charges payable when collected by boat; “charges to be collected” a certain sum, being the value of the goods, and it was decided that if the carrier delivered the goods without collecting such charges, he was liable therefor to the person who so contracted with him and delivered the goods to him.<sup>4</sup> Where a note is taken for collection by the carrier and its failure to collect is due to its negligence, it is liable for the damage resulting.<sup>5</sup> But, where it was guilty of no negligence, the failure of a bank upon which it took a check for collection, imposed no liability.<sup>6</sup> It has been said, that the letters “C. O. D.” have acquired in the commerce of the country, when used upon goods in the possession of the carrier for transportation, such a fixed and determinate meaning, that courts and juries, from their general information, may readily understand what they mean.<sup>7</sup> But this has been denied

<sup>1</sup> *Aaron v. Adams Exp. Co.* 27 Ohio L. J. 183; *Lyons v. Hill*, 46 N. H. 49.

<sup>2</sup> *Herrick v. Gallagher*, 60 Barb. 566.

<sup>3</sup> *Gibson v. American Merchants U. Exp. Co.* 1 Hun, 387.

<sup>4</sup> *Meyer v. Lemcke*, 31 Ind. 208.

<sup>5</sup> *Knapp v. United States & C. Exp. Co.* 55 N. H. 348.

<sup>6</sup> *Eiswald v. Southern Exp. Co.* 60 Ga. 496.

<sup>7</sup> *United States Exp. Co. v. Keefer*, 59 Ind. 263.

in another case.<sup>1</sup> Where goods are marked "C. O. D.," the contract of the common carrier is "collect on delivery," and return to the consignor the charges for the goods; and, under such a contract, the consignor may bring his action for failure to comply with it, against the carrier; although the ordinary rule is, that an action for the loss of goods must be brought in the name of the consignee.<sup>2</sup>

The act of the carrier in accepting conditional payment, may be ratified by the consignor and relieve it from responsibility.<sup>3</sup> If the carrier accepts a check, which the consignor receives and sends for collection, this act of the consignor will be a ratification.<sup>4</sup> Where goods are sent "C. O. D." an action for replevin may be maintained by the carrier against the consignee, who obtained them by fraud, without payment.<sup>5</sup> If the goods have been received from the carrier by the consignee, through the negligence of the carrier, without payment, and have been transferred to a bona fide purchaser, there can be no recovery from such purchaser.<sup>6</sup> This duty of collection, cannot be imposed upon a carrier if it has not been accustomed to thus receiving goods, nor, under such circumstances will it be responsible, although the goods are marked "C. O. D." for the value of the goods, where it delivers them without collecting the value.<sup>7</sup>

### § 33. *Usage or Custom as Affecting Carrier's Liability.* See also § 74.

A usage, custom, and course of dealing should, to affect a contract in the absence of actual knowledge thereof, be so long continued and so well known and established, and so uniformly acted upon, as to raise a presumption that it was known to both contracting parties, and that their contract was made in reference to

<sup>1</sup> *McNichol v. Pacific Exp. Co.* 12 Mo. App. 401.

<sup>2</sup> *United States Exp. Co. v. Keefer*, 59 Ind. 263.

<sup>3</sup> *Brooks v. American Exp. Co.* 14 Mun. 364.

<sup>4</sup> *Rathbun v. Citizens S. B. Co.* 76 N. Y. 376, 32 Am. Rep. 321.

<sup>5</sup> *American Merchants U. Exp. Co. v. Willsie*, 79 Ill. 92.

<sup>6</sup> *Norfolk Southern R. Co. v. Barnes*, 5 L. R. A. 611, 104 N. C. 25.

<sup>7</sup> *Chicago & N. W. R. Co. v. Merrill*, 48 Ill. 425.

it.<sup>1</sup> A certain river boom company receives and handles all logs coming down the Mississippi river to Minneapolis, and its methods of business and usage in receiving and surveying, turning out logs, and collecting charges, are well established and generally known; and dealers of logs in that market are therefore presumed to contract with reference to such usage, where there is nothing in the agreement to exclude the inference.<sup>2</sup>

Usages of trade, Mr. Greenleaf says, should be sparingly adopted by the courts as rules of law. "Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts arising, not from express stipulation, but from mere implications and presumptions and acts of a doubtful and equivocal character, and to fix and explain the meaning of words and expressions of doubtful or various senses."<sup>3</sup> Usages of trade are admissible, however, to show the relative duties and rights of parties as incidents of contracts and transactions; but the usage sought to be invoked must have all the elements of a usage as to certainty, uniformity, notoriety and reasonableness, and it must not be contrary to law. The existence or nonexistence of a custom is a question of fact for a jury. Its validity or invalidity is a question of law for a court.<sup>4</sup> Usage must not be in restraint of trade nor conflict with public policy or the law of the land. It must be reasonable and not productive of any injustice in its practical operations.<sup>5</sup> A usage cannot override an express contract, nor can a usage be valid which is in contravention of an established rule of law.<sup>6</sup> While it is true that a usage of trade may sometimes be proved in order to ascertain the manner of discharging some duty, or performing an act stipulated to be performed in a contract, such proof is never competent, however, when the effect of it would be to prove a

<sup>1</sup> *Wausau Boom Co. v. Dunbar*, 75 Wis. 153.

<sup>2</sup> *Clarke v. Hall & D. Lumber Co.* 41 Minn. 105.

<sup>3</sup> 2 Greenl. Ev. § 251.

<sup>4</sup> *Sullivan v. Jernigan*, 21 Fla. 264.

<sup>5</sup> *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Mitchell v. Reynolds*, 1 P. Wms. 181; *Bowen v. Stoddard*, 10 Met. 381; *Metcalf v. Wild*, 14 Gray. 210.

<sup>6</sup> *Pickering v. Weld*, 159 Mass. 522.

usage inconsistent with the express terms of the contract.<sup>1</sup> Neither usage nor custom can be set up to absolve the carrier from his ordinary duties, which the public policy, his general undertaking or his special promise may have bound him to do.<sup>2</sup> Custom cannot change a definite contract; and no custom is binding which is not certain, definite, uniform and notorious.<sup>3</sup>

Any practice at a particular place, however general it may have become, has not the force of a custom to release its merchants from the obligation of an ordinary bill of lading.<sup>4</sup> Where the language of the bill of lading has a definite legal meaning, proof of a custom cannot change it.<sup>5</sup> Evidence as to usage is inadmissible where its plain effect would be to vary or contradict the written contract.<sup>6</sup> Evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for its express terms, an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition.<sup>7</sup> When the meaning of words is not ambiguous, proof of usage will not be received in the interpretation of contracts.<sup>8</sup> A usage, or even an agreement between the parties, that the defendant should deliver its consignments to plaintiff on a side track near the station, will not discharge defendant from liability upon a claim of actual delivery, where the car was placed

<sup>1</sup> *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211; *Spears v. Ward*, 48 Ind. 541; *Seavey v. Shurick*, 110 Ind. 494; *Smith v. News*, 4 L. R. A. 392, 114 N. Y. 190.

<sup>2</sup> *Pittsburg, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 453.

<sup>3</sup> *Lamb v. Henderson*, 63 Mich. 302, citing *Harvey v. Cady*, 3 Mich. 431; *Erwin v. Clark*, 13 Mich. 10; *Hutchings v. Ladd*, 16 Mich. 493; *Advertiser & T. Co. v. Detroit*, 43 Mich. 116; *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474; *Greenstine v. Borchard*, 50 Mich. 434, 45 Am. Rep. 51.

<sup>4</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177.

<sup>5</sup> *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 312, 15 L. ed. 656.

<sup>6</sup> *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; *Smith v. Mobile Nav. & Mut. Ins. Co.* 30 Ala. 167; *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145; *Powell v. Thompson*, 80 Ala. 51.

<sup>7</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 606, 20 L. ed. 784; *The Reeside*, 2 Sumn. 567; *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 316, 15 L. ed. 657.

<sup>8</sup> *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Macomber v. Parker*, 13 Pick. 175; *The Reeside*, *supra*; *McArthur v. Sears*, 21 Wend. 190; *Gage v. Meyers*, 59 Mich. 300.

on the side track without notice to plaintiff, and permitted to remain there two days and until it was destroyed by fire.<sup>1</sup> The liability of a common carrier cannot be limited by a custom not brought to the knowledge of the party dealing with it.<sup>2</sup> Evidence of usage should be admitted with extreme caution, and not until the party offering it has distinctly stated what usage he intends to prove.<sup>3</sup> In an action to recover damages for injury to cattle, caused by negligence, in defendant railroad company, if its method of transportation was unsafe, the fact that it was usual with the defendant cannot exonerate it from its contract to safely transport. Its own usage would have no tendency to show that it had adopted a safe method.<sup>4</sup> That a railway company for some time paid cost of hauling coal from complainant's wharf to station is not ground for compelling such payment by the company.<sup>5</sup>

A usage cannot be a good usage if it is contrary to law or public policy. For example, the defendant offers to show a custom of railroads not to receive for transportation any live stock unless under certain conditions, modifying their common law liability. Such a custom would be bad, because railroads cannot legally refuse to ship live stock. A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform it could not be sustained because it, the custom, would be against law. The custom required the owner to go along on the same train with his stock, to feed and water them at his own risk and expense. The law imposes this duty on the carrier, and the carrier cannot transfer it to the shipper by custom. The shipper might agree to go with his stock, and to feed and water them at his own expense, but he could not be compelled to do so by custom, because the law requires this duty of the carrier. This custom also required that the owner of the stock would hold the railroad harmless against ordinary delays in tak-

<sup>1</sup> *Pindell v. St. Louis & H. R. Co.* 34 Mo. App. 675.

<sup>2</sup> *Little v. Fargo*, 43 Hun, 233; *Noble v. Kennoway*, 2 Dougl. 513.

<sup>3</sup> *Susquehanna Fertilizer Co. v. White*, *supra*.

<sup>4</sup> *Leonard v. Fitchbury R. Co.* 143 Mass. 307.

<sup>5</sup> *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

ing up freight. If the law held the railroad harmless for such delays, a custom would not be necessary. If the law held it liable a custom could not repeal or suspend the law.

It was also required by the custom proposed, that the shipper should expressly agree that, as a condition precedent to his right to any damages for any loss or injury to his stock during transportation, he should give notice of his claim therefor, verified by his affidavit, to some general officer of the railroad, or the nearest station agent, before the stock was removed from the point of shipment or destination. If the shipper should make a contract to give such notice, it might be binding, if it was shown that there was such officer or agent at the point of destination upon whom the notice could be conveniently served. If the custom did not propose to show that there was such officer or agent at the point of shipment or destination, it would be an unreasonable custom. It would be an unreasonable stipulation in a contract limiting the carrier's liability, and as an express contract for that reason it could not be enforced.<sup>1</sup>

A custom cannot require that a shipper shall expressly agree to a limitation of his right to damages. The law of the land regulates such matters, and fixes liability upon failure to perform duties and obligations of carriers; and when so fixed a custom cannot extinguish it, or require the injured party to limit it by agreement. The same may be said of the stipulation in a custom requiring the shipper to agree, as a condition to ship his stock on a railroad, that, in case of total loss of stock, the measure of damages should not be more than the cash value of the same at the place of shipment. Such a custom would be illegal, and the carrier could not require that the shipper should make such a special contract.<sup>2</sup> In a case recently decided by the supreme court of Massachusetts the appeal was by plaintiff from a judgment of the superior court in favor of defendant in an action brought to cover possession of two horses shipped by plaintiff over the Old

<sup>1</sup> *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127. See also § 70.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314; *Missouri Pac. R. Co. v. Fagan*, *supra*. See also § 71.

Colony Railroad from Boston to New Bedford. The transportation of the plaintiff's horses was under an express contract. This contract was prepared by the railroad company, and called "Live Stock Receipt." In it the company acknowledged the receipt of the two horses marked for the plaintiff at New Bedford, Mass., "which the company promises to forward by its railroad, and deliver to            or order at its depot in            . He or they first paying freight for the same." "N. B. If merchandise be not called for on its arrival, it will be stored at the risk and expense of the owner." Then followed the rates for transporting different kinds of animals; after which were certain rules and regulations in regard to freight. Among these rules were the following: "Nor will they [the company] hold themselves liable as common carriers for such articles after their arrival at their place of destination and unlading in the company's warehouses or depots." "Machinery . . . and live animals will only be taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, unless specially agreed to the contrary." "All articles of freight arriving at their place of destination must be taken away within twenty-four hours after being unladen from the cars." The plaintiff paid for the transportation of the horses on their arrival at New Bedford, and took a receipt which contained the same rules and regulations copied above, and applied for his horses; and the agent of the railroad company refused to unload the horses, and required the plaintiff to unload them. In the opinion of a majority of the court the railroad company was held, under this contract, to have undertaken to unload the horses, though at the owner's risk. This contract, it is said, was made out with express reference to the carriage of live animals. The railroad company promised to deliver them, and this implies unloading them. The company would also store them, unless called for, and this also implies unloading them. There are three several stipulations as to unloading goods, one of which in express terms includes live animals, and each of which implies that the company will unload them. It must therefore be held that the company undertook to unload them.

This being so the rule is recognized that a usage of the company's agent at New Bedford to require the owner or consignee to unload live animals is of no consequence. The usage cannot override the contract.<sup>1</sup> A rule and regulation of the company can have no greater effect. The company's rule requiring consignees to unload live stock was not otherwise known to the plaintiff than this; he knew that the company's agent at New Bedford had been accustomed to require consignees to unload their horses. But if well known, it must still give way to the contract. It was a matter of contract between the plaintiff and the railroad company that the company should unload the plaintiff's horses. This being so, neither a usage nor a rule to the contrary will avail to excuse the company from the performance of its undertaking. In this respect, the case differs from *Miller v. Mansfield*, 112 Mass. 260, and other cases, where there was no such contract.<sup>2</sup>

Proof of usage on part of a carrier in giving bills of lading exempting it from certain classes of losses, is not competent to limit its liability.<sup>3</sup> But it is within the legitimate and proper scope of a usage of trade, to regulate the time, place, and manner of the delivery of a cargo when there is no express contract upon the subject; and under such circumstances the usage enters into and forms part of the contract. A general custom of a port that after a vessel arrives thereat and goes to a wharf designated by the consignee, and the cargo is taken off and distributed upon the wharf according to the numbers and marks, the care of the goods devolves upon the consignee, is not contrary to any well established and general rule of law; and the parties to a contract of shipment must be deemed to have contracted with reference to it.<sup>4</sup>

<sup>1</sup> *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Seccomb v. Provincial Ins. Co.* 10 Allen, 305, 319; *Dodd v. Furlow*, 11 Allen, 426, 429, 87 Am. Dec. 726; *Boardman v. Spooner*, 13 Allen, 353, 359, 90 Am. Dec. 196; *Odiorne v. New England Mut. M. Ins. Co.* 101 Mass. 551, 3 Am. Rep. 401; *Snelling v. Hall*, 107 Mass. 124; *Huskins v. Warren*, 115 Mass. 514, 535, 536; *Hedden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Emery v. Boston M. Ins. Co.* 138 Mass. 398; *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224.

<sup>2</sup> *Benson v. Gray*, 13 L. R. A. 262, 154 Mass. 391.

<sup>3</sup> *Illinois Cent. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301.

<sup>4</sup> *Pickering v. Weld*, 159 Mass. 522.



A deposit of goods designed for immediate transportation, in a condition to be carried in pursuance of the usage of the parties, which the local agent had permitted, at the usual place of loading, constitutes a delivery to the common carrier, making it liable for the loss of the goods by fire at such place, although the superintendent of the railroad does not know of such usage and it is contrary to the positive order of the management.<sup>1</sup>

<sup>1</sup> *Evansville & T. H. R. Co. v. Keith* (Ind. App.) Nov. 7, 1893.

## CHAPTER V.

### VALIDITY OF BILL OF LADING—ITS LIMITATIONS OF LIABILITY.

- § 34. *Whether Notice or Acceptance of Bill Constitutes Contract.*
- § 35. *When Acceptance of Bill Concludes Contract.*
- § 36. *Bill Delivered after Accepting Goods.*
- § 37. *Limitation Consented to by Agent.*
- § 38. *Validity of Bill Depends on Reception of Goods by Carrier.*
- § 39. *Exceptions in Bill Waived by Negligence.*
- § 40. *Effect of Exception in Bill.*

#### § 34. *Whether Notice or Acceptance of Bill Constitutes Contract.*

A contract with a carrier is not to be construed most strongly against it merely because such contracts are generally drawn up by the carrier or its agents.<sup>1</sup> A common carrier may limit his common law liability as insurer, but under the ruling in many of the courts there must be an express agreement, not a mere notice (*ante* § 11) and the limitation, it is generally declared, cannot extend to exempt him from damages for actual negligence of himself or his servants.<sup>2</sup> It has been held that a public notice, although brought home to the shipper, will not discharge the common carrier from its legal liability for accidental loss or destruction of goods.<sup>3</sup> There are other authorities, however, while admitting that the general notice will not free the carrier from all liability for prop-

<sup>1</sup> *Louisville & N. R. Co. v. Touart*, 97 Ala. 514.

<sup>2</sup> *The Pacific*, Deady, 17; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 486, 14 L. ed. 509; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Walker v. Western Transp. Co.* 70 U. S. 3 Wall. 150, 18 L. ed. 172; *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 19 L. ed. 457; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 496, 94 Am. Dec. 607, *ante* § 14.

<sup>3</sup> *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222, 32 N. H. 523. 64 Am. Dec. 381; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567; *Blumenthal v. Bruinard*, 38 Vt. 402, 91 Am. Dec. 350; *Mann v. Birchard*, 40 Vt. 326.

erty, yet hold that the notice brought to the knowledge of the owner, may reasonably qualify its liability.<sup>1</sup>

The fact that the bill of lading contained words limiting the liability is not enough, without inference that consignor assented.<sup>2</sup> An unsigned notice given on the back of a receipt, by a carrier for goods to be transported by it, that all goods and merchandise are at the risk of the owner's thereof while in the company's warehouses, does not relieve such company from its obligations as a common carrier.<sup>3</sup> A pamphlet hanging in a railroad company's office, containing freight rules and rates, although the law requires them to be posted, is not of itself constructive notice of its contents.<sup>4</sup> A carrier and his customer do not, with respect to bills of lading, stand on the same plane or footing of equality, since in many cases the latter has no alternative as to the kind of bills he will receive, and cannot, in such a case, be estopped by its contents.<sup>5</sup> Nothing short of an express stipulation by parol or in writing will be permitted under the decision of the Supreme Court of the United States, to discharge a carrier from duties which the law has annexed to his employment.<sup>6</sup> A carrier cannot limit his liability by any act of his own,<sup>7</sup> but if the act have the consent of the shipper, the stipulation becomes a contract.<sup>8</sup> It has been held that the assent of a shipper to the conditions in a receipt or bill of lading, whereby the common law liability of the carrier is restricted, will not be inferred by the mere fact of acceptance of the bill or receipt without objection.<sup>9</sup> Perhaps the

<sup>1</sup> *Smith v. North Carolina R. Co.* 64 N. C. 235; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659.

<sup>2</sup> *The Pacific, Deady*, 17; *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Hill v. Syracuse, B. & N. Y. R. Co.* 8 Hun, 296.

<sup>3</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318-330, 21 L. ed. 297, 303.

<sup>4</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>5</sup> *Lallande v. His Creditors*, 42 La. Ann. 705, 45 Am. & Eng. R. Cas. 301.

<sup>6</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318-330, 21 L. ed. 297-303.

<sup>7</sup> *Wallace v. Sanders*, 42 Ga. 486; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465.

<sup>8</sup> *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606; *Judson v. Western R. Corp.* 6 Allen, 486, 83 Am. Dec. 646; *Mann v. Birchard*, 40 Vt. 326.

<sup>9</sup> *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51.

weight of authority in this country is, that public notice, although brought home to the knowledge of the shipper, will not restrict the liability of the common carrier.<sup>1</sup> A shipping receipt, it is said, to lessen or abridge the common law liability, must be signed by the shipper as well as the carrier.<sup>2</sup> To be valid, a contract restricting a carrier's liability must be fairly obtained, just, and reasonable. Mere acquiescence by shippers in the use of bills of lading containing a clause exempting from liability for fires, will not show the reasonableness of the exemption, where the shippers have not had an opportunity of selecting between bills of lading with and those without this clause.<sup>3</sup>

A ticket issued by the Indianapolis & C. R. Co. secured a right of passage from Indianapolis to Shelbyville, and the traveler's baggage was taken charge of by the company for delivery at Shelbyville, and a check given him for it, on one side of which was stamped these words: "In consideration of free carriage, its value is agreed to be limited to one hundred dollars and on the others, "I. & C. R. R., 583, Indianapolis and Shelbyville." The passenger could have read the words and figures on the check. The value of the baggage exceeded one hundred dollars and was lost by the company. It was held in this case, that the limitation expressed in the words stamped on the check could not, in any case, apply to a loss resulting from the company's want of care; and that if such a limitation of the liability imposed by law could be secured by the carrier, it could only be by an express contract.<sup>4</sup> Courts which recognize the right of the carrier to limit its liability by notice, agree, however, that the terms of the notice must be clear and explicit, and the person with whom the carrier deals must have knowledge of the terms of the notice; and, where the notice is in a different language from that familiar to the party

<sup>1</sup> *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Brown v. Adams Exp. Co.* 15 W. Va. 812.

<sup>2</sup> *Burroughs v. Grand Trunk R. Co.*

<sup>3</sup> *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Erie R. Co. v. Lockwood*, 28 Ohio St. 358; *Grey v. Mobile Trade Co.* 55 Ala. 387.

<sup>4</sup> *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360.

who is to be bound by it, some proof of knowledge, on his part, of its terms, must be shown.<sup>1</sup> Where exemption is claimed under an exception, not signed by the shipper, the carrier must allege and prove, at least inferentially, the assent of the latter.<sup>2</sup> Certainly a notice limiting the responsibility of the carrier must be unequivocal and published to the world.<sup>3</sup> Where a carrier, attempting to limit his liability by notice, gives two notices, he will be bound by that which is least beneficial to himself.<sup>4</sup> And the same rule obtains in bills of lading.<sup>5</sup>

By the statute of Illinois the mere acceptance of the receipt for the freight does not import assent to its exceptions without additional proof. The act in respect of common carriers, approved March 27, 1874, provides "that, whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." This is substantially re-enacted in § 82, chap. 114, relating to railroads.<sup>6</sup> These statutes do not in terms prohibit common carriers from limiting their common law liabilities by contract with the owner of property delivered for transportation. Formerly the restriction of a carrier's liability, when expressed in a mere receipt, often gave rise to the question as to whether the shipper had knowingly assented thereto, and this enactment was doubtlessly intended to obviate the difficulty growing out of that condition. In many respects a railway carrier

<sup>1</sup> *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67, 55 Am. Dec. 481; *Elsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661.

<sup>2</sup> *Guines v. Union Transp. & Ins. Co.* 28 Ohio St. 418; *Merchants Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

<sup>3</sup> *Butler v. Heane*, 2 Campb. 415.

<sup>4</sup> *Munn v. Baker*, 2 Stark. 255; *Cobden v. Bolton*, 2 Campb. 108; *Burton v. English*, L. R. 2 Q. B. Div. 218; *Norman v. Binnington*, L. R. 25 Q. B. Div. 475; *Taylor v. Liverpool & G. W. Steam Co.* L. R. 9 Q. B. 546.

<sup>5</sup> *Kansas City, M. & B. R. Co. v. Holland*, 68 Miss. 351; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 524; *Black v. Goodrich Transp. Co.* 55 Wis. 319, 42 Am. Rep. 713.

<sup>6</sup> Rev. Stat. 1889, chap. 114, § 82.

may, by express contract, limit its strict common law liability. It may by special contract limit the liability to such damage or loss as may occur on its own line of carriage.<sup>1</sup> The carrier may limit its liabilities against loss by fire without his fault,<sup>2</sup> and the liability may thus be limited as an insurer, and against other loss, not attributable to its negligence or that of its servants, and may require the value of goods offered for transportation to be fixed by the shipper, to protect itself against fraud in case of loss. A shipper is not then bound by the conditions of a bill of lading signed neither by himself nor his agent.<sup>3</sup>

Under Dak. Civ. Code, § 1261, providing that the obligations of a common carrier cannot be limited by general notice, and § 1263, providing that, except as to the rate of hire, time, place, and manner of delivery, the acceptance of a ticket, bill of lading, or written contract shall not constitute an acceptance of provisions modifying the carrier's obligations, unless the person accepting it manifests his assent by his signature, a provision in an express company's contract or receipt, exempting the company from liability unless a claim should be presented in writing within ninety days from that date, is of no effect, where such contract or receipt was signed only by the company's agent.<sup>4</sup> An agreement restricting the carrier's liability except as "to the rate of hire, the time, place, and manner of delivery," can only be manifested under S. D. Comp. Laws, § 3888, by the signature of the passenger, consignee, or person employing such carrier.<sup>5</sup> A railroad company cannot avail itself of any limitation or restrictions of its general liability expressed in bills of lading, not assented to by the shipper except by acceptance of such bills of lading, under Ga. Code, § 2068, declaring that a common carrier cannot limit his liability

<sup>1</sup> *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Field v. Chicago & R. I. R. Co.* 71 Ill. 458; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Wabash, St. L. & P. R. Co. v. Jaggerman*, 115 Ill. 407.

<sup>2</sup> *Van Schaack v. Northern Transp. Co.* 3 Biss. 394.

*Ohio & M. R. Co. v. Hamlin*, 42 Ill. App. 441.

<sup>4</sup> *Hartwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463.

<sup>5</sup> *Kirby v. Western U. Teleg. Co.* (S. D.) 55 N. W. Rep. 759.

by any notice given either by publication or by entry on receipts given or tickets sold, but may make an express contract.<sup>1</sup>

### § 35. *When Acceptance of Bill Concludes Contract.*

The owner's consent to conditions in a receipt is not always conclusively evidenced by his acceptance of the receipt. It is often only prima facie evidence that he assented to the conditions. Thus, if a verbal agreement had been made as to the shipment, it might be assumed that the shipper supposed no other conditions were inserted in the receipt.<sup>2</sup> But the acceptance of a receipt from the carrier containing conditions limiting its liability, which the law permits, with full knowledge on the part the shipper of such conditions, and by his acceptance intending to assent to the restrictions, becomes his contract as fully as though executed in form.<sup>3</sup>

The rule often stated is that, in the absence of fraud or mistake, the acceptance of the bill of lading precludes the shipper from alleging that he was not advised of the contents of the bill;<sup>4</sup> that in order to establish the acceptance by the shipper of his assent to the bill of lading, it is not necessary to show his signature to the bill;<sup>5</sup> that all previous parol agreements are merged where a bill of lading is made out by the carrier and accepted by the shipper;<sup>6</sup> that a shipper's acceptance of a bill of lading without objection raises a prima facie presumption that he knew its contents and assented to its stipulations in the carrier's favor.<sup>7</sup> No special contract is to be implied from the general course of dealing of a railroad company in delivering to shippers receipts containing a provision

<sup>1</sup> *Central R. & Bkg. Co. v. Hasselkus* (Ga.) April 24, 1893.

<sup>2</sup> *Strohn v. Detroit & M. R. Co.* 21 Wis. 554, 94 Am. Dec. 564.

<sup>3</sup> *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92.

<sup>4</sup> *Wertheimer v. Pennsylvania R. Co.* 1 Fed. Rep. 232; *Mulligan v. Illinois Cent. R. Co.* 36 Iowa, 181, 14 Am. Rep. 514; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 7 Hun, 233.

<sup>5</sup> *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353.

<sup>6</sup> *Boatwick v. Baltimore & O. R. Co.* 55 Barb. 137; *Long v. New York Cent. R. Co.* 50 N. Y. 76.

<sup>7</sup> *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 392.

exempting it from liability for damages from certain causes, exempting it from liability for loss, by fire, of hay delivered to and accepted by it for transportation, without delivery of any shipping bill, receipt, or shipping orders.<sup>1</sup> It has been held, that the acceptance of a bill of lading without reading it and without objection or protest against the limitations therein from liability, creates a presumption of assent.<sup>2</sup> This presumption, however, is not always conclusive.<sup>3</sup> It is a question of fact for the jury, whether the shipper had knowledge of and assented to, the limitation.<sup>4</sup>

A shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and if he receives such receipt without objection his assent to its conditions will, in the absence of fraud, be conclusively presumed.<sup>5</sup> A special contract limiting the liability of a carrier is binding upon the shipper when freely and fairly executed by him, although it was not read to him, and he was ignorant of its contents,—especially when he receives a duplicate or copy.<sup>6</sup> A shipper who signs a contract limiting the carrier's liability cannot evade its effect on the ground that he did not know of its contents, and signed it under a misapprehension thereof, where he had opportunity to read it or hear it read.<sup>7</sup>

In New York where, upon delivery of goods and before shipment, a carrier delivers a bill or receipt limiting his liability, and the shipper receives the same without objection, he is chargeable

<sup>1</sup> *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 598.

<sup>2</sup> *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288.

<sup>3</sup> *Merchants Despatch Transp. Co. v. Leysor*, 89 Ill. 43.

<sup>4</sup> *Field v. Chicago & R. I. R. Co.* 71 Ill. 458; *Boscowitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191.

<sup>5</sup> *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453.

<sup>6</sup> *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210.

<sup>7</sup> *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397. See *Guillaume v. General Transp. Co.* 100 N. Y. 491; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422.



with notice of its contents and is bound by its terms; and prior parol negotiations in regard to immediate shipment of goods, cannot be resorted to, to vary its terms.<sup>1</sup> The acceptance by the shipper, of a bill of lading, limiting the responsibility of the carrier, signed by its agent, and sent by the shipper to their agent as authority to receive the goods,—shows the terms on which the goods were received by the carrier.<sup>2</sup>

In a recent case in the United States Circuit Court for the Southern District of New York, the questions in the case which are of general importance arise upon alleged limitations of the carrier's liability, which were expressed in the contract printed on the ticket. The court finds that the tickets were purchased in England; that they were maritime contracts; that the part of the agreement which is important to the case is contained in that part of the notice to cabin passengers printed on the tickets which relates to the care of baggage and valuables. At the bottom of the face of the ticket are the words in conspicuous black-faced type. "See back." At the top of the other side is the sentence, "This contract is subject to the following conditions." Seven of these follow. Nos. 3, 4 and 7 bear on the case. No. 3 reads: "Neither the shipowner, the passage broker, nor agent is responsible for the loss or injury to the passenger or his luggage or personal effects, or delay on the voyage arising from latent defects in the steamer, her machinery, gear, or fittings; or from act of God or the Queen's enemies; perils of the sea or rivers; restraint of princes, rulers, and people; barratry, or negligence in navigation of the steamer or of any other vessel." The fourth condition is: "Neither the shipowner nor the passenger agent is in any case liable for the loss of or injury to or delay in the delivery of lug-

<sup>1</sup> *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163, reversing 8 Hun, 296; to the same effect, *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Soumet v. National Exp. Co.* 66 Barb. 284.

<sup>2</sup> *Lamb v. Camden & A. R. & Transp. Co.* 2 Daly, 454; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526; *School Dist. in Medfield v. Boston, H. & E. R. Co.* 102 Mass. 552, 3 Am. Rep. 502; *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.* 1 Disney, 480; *York Mfg. Co. v. Illinois Cent. R. Co.* 1 Biss. 377; *Woodward v. Illinois Cent. R. Co.* 1 Biss. 447; *Farnham v. Camden & A. R. Co.* 55 Pa. 53.

gage or personal effects of the passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description upon which a percentage will be charged) is paid." The last condition is that all questions arising on the ticket shall be decided according to the English law with reference to which that contract is made. The court finds that neither the father of the two young women passengers, who purchased the tickets, nor either of the women, read this notice on the back of the tickets, or knew its contents, and that no declaration of the extraordinary value of their property had been made, as was required under the fourth condition. Judge Shipman, who tried the case, discusses the matter at great length. He objects to the contract and conditions because they were clumsily drawn and because they were not on the face of the ticket, where they would have been more conspicuous, but he holds, nevertheless, that they were binding, provided they were brought to the attention of the purchaser. In effect he says that if they were not so brought to the knowledge and attention of the purchaser they would not be binding and the company could not save itself by them. It was not asserted by the company that the conditions of the contract were read to the father, when he purchased the tickets, but the judge held that as he had had the tickets in his possession some time before they were used he had sufficient opportunity to read them, and he should have done so. He also had sufficient opportunity to look up the law and find just how far the company could be held liable in case of damage. "Therefore," the judge says, "the regulation was distinctly brought to the knowledge of Mr. Potter, the father." The judgment of the district court was reversed, with instruction that the damage awarded to each of the passengers be reduced to \$43.67 and interest to date.<sup>1</sup>

It has been held (March, 1894) that a change made by the carrier in the name of the place of delivery, before the return of the

<sup>1</sup> *Potter v. The Majestic*, 23 L. R. A. 746, 60 Fed. Rep. 625.

bill of lading to the shipper, is a rejection by the carrier of the terms proposed in the bill of lading; and, unless the shipper gives notice within reasonable time of his dissent from the alteration, he will be held to have accepted the change,—although in fact, it was unnoticed by him.<sup>1</sup> The consignee and endorsee of a bill of lading who is owner of the goods and the bill of lading and accepts the goods thereunder, is bound by its terms.<sup>2</sup>

A receipt by a carrier for goods delivered to it for shipment, merely calling attention to unsigned conditions printed on its back, and stating that a bill of lading is to be given thereafter, is not a contract of shipment such as to merge an oral agreement for shipment.<sup>3</sup>

### § 36. *Bill Delivered after Accepting Goods.*

After the goods are shipped, it is too late to impose upon the shipper a clause exempting the carrier from liability from loss by fire, after such fire has occurred.<sup>4</sup> The acceptance by the shipper of a receipt for goods, containing a clause limiting the carrier's liability, is only "prima facie" evidence of the shipper's assent to the condition. The shipper may show previous delivery of goods.<sup>5</sup> A carrier cannot contract for a limitation of liability for loss of property through its negligence while in its possession for transportation.<sup>6</sup> While a bill of lading is prima facie evidence of the truth of its contents, the carrier may show any injury, loss, fraud or deceit occasioned or practiced by the shipper, or any previous carrier.<sup>7</sup> And where goods are delivered to carrier under agreement not restricting its common law liability, it cannot thereafter insert in bill of lading clauses restrictive of its usual liability.<sup>8</sup>

<sup>1</sup> *Muller v. Cincinnati, H. & D. R. Co.* 2 Cin. Super. Ct. 280.

<sup>2</sup> *Neilsen v. Jesup*, 30 Fed. Rep. 138.

<sup>3</sup> *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, Aff'g 47 Ill. App. 561.

<sup>4</sup> *Lamb v. Camden & A. R. Co.* 4 Daly, 483.

<sup>5</sup> *Strohn v. Detroit & M. R. Co.* 21 Wis. 554, 94 Am. Dec. 564.

<sup>6</sup> *International & G. N. R. Co. v. Folts*, 3 Tex. Civ. App. 644.

<sup>7</sup> *Great Western R. Co. v. McDonald*, 18 Ill. 172.

<sup>8</sup> *Park v. Preston*, 108 N. Y. 434.

A bill of lading limiting liability signed only by carrier sent to shipper after receipt of goods without any contract limitation, will not bind shipper.<sup>1</sup> After the delivery of goods under a verbal agreement, the delivery to the shipper of a bill of lading, partly written and partly printed, will not have the effect of merging the verbal stipulations therein, so far as they limit the liability of the carrier. The omission by the shipper, through inadvertence, to examine the printed conditions, will not conclude him as having accepted under the bill of lading, nor prevent his showing what the actual agreement under which the goods were shipped, was.<sup>2</sup> Presumption of assent by the shipper will not be indulged where it is shown that before the delivery of the bill of lading, goods have been sent forward, so that the shipper could not have reclaimed them had he objected to the contents of the bill.<sup>3</sup>

The rule may be thus stated: The carrier can not abrogate or alter a contract, under which goods have been shipped, by merely signing and mailing bills of lading which did not reach the plaintiffs until after the goods had left, and much, if not all, the loss has accrued. Where there was not conclusive evidence that the plaintiffs consented to accept the bills of lading in place of the prior contract, that contract must control.<sup>4</sup>

Where the evidence warrants a finding that the merchandise transported was delivered to and accepted by the carriers under a special contract, and there is no conclusive evidence that the consignor consented to accept the bills of lading in place of such contract, the carrier's liability is fixed by such special contract and can not be abrogated or altered by the subsequent signing and mailing of bills of lading by the carriers which did not reach the consignor (who was also the consignee) until after the loss occurred.<sup>5</sup> Thus, a stove broken *en route* is at the carrier's risk,

<sup>1</sup> *Central R. Co. v. Dwight Mfg. Co.* 75 Ga. 609; *Guillaume v. General Transp. Co.* 100 N. Y. 491; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422.

<sup>2</sup> *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Baker v. Michigan S. & N. I. R. Co.* 42 Ill. 73.

<sup>3</sup> *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113.

<sup>4</sup> *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Guillaume v. General Transp. Co.* 100 N. Y. 491; *Wheeler v. New Brunswick & C. R. Co.* 115 U. S. 29, 29 L. ed. 341; *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

<sup>5</sup> *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

where the freight agent applied to for shipment of that and other office furniture informed the shipper that it was customary for shippers to release stoves, but advised him to pay extra and send at the carrier's risk, to which the shipper assented, and after the goods were shipped the agent handed him a bill of lading conditioned that stoves should be at the owner's risk, telling him that it was a receipt for the goods, the shipper putting it in his pocket without examination.<sup>1</sup> So, a special contract limiting the liability of a carrier, signed by a shipper of horses after they are aboard the train, upon a demand of the agent of the carrier, combined with a statement that otherwise the horses will not go on that train,—is not binding upon him;<sup>2</sup> although the refusal to receive or forward goods for carriage, except upon the conditions limiting the carrier's common law liability, is sufficient ground for an action at law.<sup>3</sup> Where the goods are delivered to the carrier and accepted, under a verbal contract, the subsequent sending of a bill of lading to the shipper—without special attention being called to the conditions varying the verbal contract—will not bind the shipper.<sup>4</sup> But a previous course of dealing being shown, under which goods were received by the carrier, and it being in proof that after such delivery a bill of lading was delivered to the shipper containing like stipulations, this evidence would create a presumption of consent by the shipper to the limitations.<sup>5</sup>

The acceptance of a bill of lading without assenting to its conditions does not conclude one who has shipped goods under a verbal agreement before the bill of lading was tendered.<sup>6</sup>

<sup>1</sup> *Union Pac. R. Co. v. Marston*, 30 Neb. 241.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210.

<sup>3</sup> *Leonard v. American Exp. Co.* 26 U. C. Q. B. 533.

<sup>4</sup> *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Wheeler v. New Brunswick & C. R. Co.* 115 U. S. 29, 29 L. ed. 341; *McCullough v. Wabash Western R. Co.* 34 Mo. App. 23; *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206.

<sup>5</sup> *Shelton v. Merchants Dispatch Transp. Co.* 59 N. Y. 258.

<sup>6</sup> *Merchants' Dispatch Transp. Co. v. Furthmann*, 149 Ill. 66, Aff'g 47 Ill. App. 561.

### § 37. *Limitation Consented to by Agent.*

The power of the agent to agree with the carrier upon a limitation of the latter's liability has been discussed in the courts.<sup>1</sup> And it has been held that knowledge by the carrier that he was contracting with an agent, put him upon inquiry as to the extent of the agent's authority.<sup>2</sup> But the general rule is that where a shipper entrusts an agent with the care of the goods for transportation, he is presumed to have clothed him with all necessary authority for contracting. A shipping contract limiting the liability of a carrier to a certain sum in consideration of a reduced rate of transportation is binding upon a shipper whose agent to make the shipment assented to the stipulation, although the limitation is not brought to the knowledge of the shipper himself.<sup>3</sup> The shipper has been bound, by his acceptance of the bill of lading, with the condition stated thereon limiting the liability of the carrier.<sup>4</sup> General authority to a consignor to deliver goods to a carrier for transportation includes power to agree on exemptions from liability.<sup>5</sup> An agent authorized to contract for the shipment has presumptive authority to agree, without special consideration, that the carrier shall have the benefit of any insurance that may have been effected upon the goods to be transported.<sup>6</sup> The exceptions to the common law liability being made in the bill of lading, and delivered to the agent of the plaintiff, must be deemed to have been agreed upon by the parties.<sup>7</sup>

But a bill of lading first issued by the shipper and delivered by his agent to the owner of the boat after it had started on its voyage, and under which the voyage was thereafter performed, must be deemed to be the contract binding upon the parties and the cargo, as against a bill sent to the consignee and signed by one of

<sup>1</sup> *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300.

<sup>2</sup> *Huys v. Campbell*, 63 Cal. 143.

<sup>3</sup> *Zimmer v. New York Cent. & H. R. R. Co.* 137 N. Y. 460.

<sup>4</sup> *Nelson v. Hudson River R. Co.* 48 N. Y. 498. See *ante* § 29, note 2.

<sup>5</sup> *Brown v. Louisville & N. R. Co.* 36 Ill. App. 140.

<sup>6</sup> *Missouri Pac. R. Co. v. International M. Ins. Co.* 84 Tex. 149.

<sup>7</sup> *Dorr v. New Jersey S. Nav. Co.* 11 N. Y. 485, 62 Am. Dec. 125; *Griffith v. Ingledew*, 6 Serg. & R. 429, 437, 9 Am. Dec. 444; *Nelson v. Hudson River R. Co.* 48 N. Y. 498.

the firm of shippers as agent of the master, without authority, and never exhibited to the master or owner before the completion of the voyage;<sup>1</sup> and a shipper to whom through rates have been stated by the station agent of a railroad, without mention of any conditions, is not bound by conditions upon shipping bills executed without his knowledge by the persons who delivered for him the property to the railroad company;<sup>2</sup> for an agent of the shipper cannot, without consideration to his principal, release the carrier from its common law liability after a contract is made for the carriage of goods.<sup>3</sup> A notice limiting the liability of the carrier which is effective, known by the principal, binds him in respect to all his agents sending goods by the same carrier, and a notice to a known agent who ships the goods will bind the principal as to such acts, although he be personally ignorant of the restriction.<sup>4</sup>

### § 38. *Validity of Bill Depends on Reception of Goods by Carrier.*

While a bill of lading covers goods subsequently delivered and received to fill it, and will represent the ownership of the goods,<sup>5</sup> yet a carrier, in issuing a bill of lading, for property delivered to him for transportation, does not warrant the title of the shipper. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.<sup>6</sup> The obligation between the ship and the cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master.<sup>7</sup> Delivery of goods to a common carrier for transporta-

<sup>1</sup> *Costello v. 734,700 Laths*, 44 Fed. Rep. 105.

<sup>2</sup> *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98.

<sup>3</sup> *Wiggins v. Erie R. Co.* 5 Hun, 185.

<sup>4</sup> *Mayhew v. Eames*, 3 Barn. & C. 601; *Clarke v. Hutchins*, 14 East, 475; *Maving v. Todd*, 1 Stark, 72.

<sup>5</sup> *Hentz v. The Idaho*, 93 U. S. 575, 23 L. ed. 978.

<sup>6</sup> *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998.

<sup>7</sup> *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455; *The Freeman v. Buckingham*, 59 U. S. 18 How. 192, 15 L. ed. 345.

tion involves exclusive possession in the carrier, and this possession involves a surrender of custody and control for the time being by the consignor.<sup>1</sup>

There is an unbroken line of authorities in England that even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading, issued by his agent, from showing that no goods were in fact received for transportation.<sup>2</sup> And this has not been at all changed by the "Bills of Lading Act." 18 & 19 Vict. chap. 111, § 3. It is also the settled doctrine of the Federal courts.<sup>3</sup> A railroad company which has issued bills of lading in advance of the receipt of the goods is not liable thereon until the goods are actually received, and is not bound to refuse the goods when tendered, if they do not correspond in grade and quality with those described in the bills of lading.<sup>4</sup>

One who accepts a bill of lading for a designated amount of cotton issued by the agent of a railway company in favor of a firm having no real existence, without any indorsement by such firm, is necessarily put on inquiry as to who such firm is, and is not protected by the provisions of Ala. Code 1886, § 1179, providing that any carrier which issues a bill of lading or receipt for property which it has not received is liable to any person injured thereby, for all damages resulting therefrom.<sup>5</sup>

A carrier is not liable on a bill of lading for property which at the time of the signing of the bill remained in the hands of the

<sup>1</sup> *Wilson v. Atlanta & C. R. Co.* 82 Ga. 386.

<sup>2</sup> *Zipsey v. Hill*, 1 Fost. & F. 573; *Grant v. Norway*, 10 C. B. 665; *Coleman v. Riches*, 16 C. B. 104; *Hubbersty v. Ward*, 8 Exch. 330; *Brown v. Powell Duffryn Steam Coal Co.* L. R. 10 C. P. 562; *McLean v. Fleming*, L. R. 2 H. L. 128; *Cox v. Bruce*, L. R. 18 Q. B. Div. 147; *Meyer v. Dresser*, 16 C. B. N. S. 646; *Jessel v. Bath*, L. R. 2 Exch. 267.

<sup>3</sup> *The Freeman v. Buckingham*, 50 U. S. 18 How. 182, 15 L. ed. 341; *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998.

<sup>4</sup> *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077; *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991; *The Joseph Grant*, 1 Biss. 193; *Robinson v. Memphis & C. R. Co.* 9 Fed. Rep. 129, 141, 16 Fed. Rep. 57; *The Alice*, 12 Fed. Rep. 496; *Law v. Botsford*, 26 Fed. Rep. 651.

<sup>5</sup> *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* (Ala.) 14 So. 546.



shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated.<sup>1</sup>

What was said on the subject in *The Freeman v. Buckingham* was probably *obiter*, for in that case it was sought to hold the interests of the general owner in a ship liable on a bill of lading issued by the special owner, who was not the agent of the former. But what is there said is important both as being the utterance of so eminent a jurist as Curtis, *J.*, and also because so often quoted with approval by the same court in subsequent cases. The case of the *Lady Franklin* did not involve the question of a bona fide purchaser, but is important as announcing that the principle is the same, whether the false bill of lading is issued fraudulently or by mistake. It is said where a bill of lading was given by mistake for goods not actually shipped, there can be no lien for nondelivery of the goods.<sup>2</sup> An instrument stating that cotton is received on dock to be transported by a certain steamer of a line, or any other steamship of the line, is not a bill of lading proper, binding upon such steamer, but only an executory contract to ship. A steamship chartered to run as part of a line is not liable *in rem* for missing bales of cotton never received on board, under a bill of lading reciting only their receipt on dock and not signed by the master but by the agent,—especially where the latter was the agent of the charterer.<sup>3</sup> In view of the later cases cited above, there is no room to doubt that the Supreme Court of the United States is firmly committed to the doctrine in its broadest scope.

A common carrier is not estopped from denying that it has clothed its agent with apparent authority to do the act, where he, having authority to sign bills of lading, has, acting in collusion with another person solely for a purpose of their own, issue a bill of lading for goods which never came into the possession of the carrier.<sup>4</sup> Bills of lading signed by the master of a

<sup>1</sup> *Missouri P. R. Co. v. MFadden*, 154 U. S. 155, 38 L. ed. 944.

<sup>2</sup> *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455.

<sup>3</sup> *The Caroline Miller*, 53 Fed. Rep. 136.

<sup>4</sup> *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991.

vessel and issued to persons who have contracted to furnish the charterers with a certain number of bales of hemp, but who have actually put on board a less number, while the bills of lading were made out for the full contract number, are not subject to the order of the shippers so as to put the charterers in the position of bona fide indorsees, where the master and owners of the ship are ignorant of the arrangement, and the mistake in the bill of lading arises from a mistake in the tally of the bales taken aboard as made by the mate.<sup>1</sup> A railway company does not, by giving its bills of lading for cotton in the sheds of another company, take possession of the cotton, and does not make the other company its agent to hold the cotton. It does not merely, by giving bills of lading for cotton in sheds of a compress company in exchange for the receipts of the compress company, become responsible for a nuisance resulting from the manner and the place in which the cotton is kept by the express company.<sup>2</sup> The inclusion in a bill of lading signed by the master of a vessel, of more goods than were actually shipped, does not make the vessel liable for any greater amount than the actual shipment, even to a bona fide indorsee of the bill of lading.<sup>3</sup>

Bills of lading, when signed by the master, duly executed in the usual course of business, bind the owners of the vessel, if the goods were laden on board or were actually delivered into the custody of the master, but it is well settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent.<sup>4</sup> The carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver but there is also an understanding between the parties that deliv-

<sup>1</sup> *The Asphodel*, 53 Fed. Rep. 835.

<sup>2</sup> *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

<sup>3</sup> *The Asphodel*, *supra*.

<sup>4</sup> *The Freeman v. Buckingham*, 59 U. S. 18 How. 187, 15 L. ed. 343; *Grant v. Norway*, 10 C. B. 665; *Zipsey v. Hill*, 1 Fost. & F. 573; *Meyer v. Dresser*, 16 C. B. N. S. 657; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779; *Maude & P. Shipping*, 233.

ery shall not be made till a future day, and that the goods until then shall remain in the custody of the shipper.<sup>1</sup> This doctrine is sanctioned by a unanimous course of English and American decisions.<sup>2</sup> Indeed, the citations might be multiplied indefinitely. Whilst the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.<sup>3</sup> The same rule obtains in Massachusetts, Maryland, Louisiana, Mississippi, Missouri, North Carolina, and apparently Ohio.<sup>4</sup>

A bill of lading is not a representative of money, used for the transmission of money or for the payment of debts, but is merely a contract for the performance of a certain duty, or a representative of goods and personal property to be delivered. Bills of lading, although made negotiable in fact by statute, are not possessed of all the incidents of negotiability that are attributes of bills and notes. Non-negotiable bills of lading are merely assignable, the same as other choses in action.<sup>5</sup> But clear proof will be required of the non-receipt of the goods, where a bill of lading is shown.<sup>6</sup> The text-writers all agree that the overwhelming weight

<sup>1</sup> *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, 38 L. ed. 944.

<sup>2</sup> *The Freeman v. Buckingham*, 59 U. S. 18 How. 182, 15 L. ed. 341; *King v. The Lady Franklin*, 75 U. S. 8 Wall. 325, 19 L. ed. 455; *The Delaware v. Oregon Iron Co.* 84 U. S. 14 Wall. 579, 20 L. ed. 779; *Pollard v. Vinton*, 105 U. S. 7, 26 L. ed. 998; *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077; *Friedlander v. Texas & P. R. Co.* 130 U. S. 423, 32 L. ed. 994; *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 239, 35 L. ed. 159; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Moses v. Boston & M. R. Co.* 24 N. H. 71; *Brind v. Dale*, 8 Car. & P. 207; *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Campb. 414; *Leigh v. Smith*, 1 Car. & P. 638; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 18 C. B. 551; *Coleman v. Riches*, 16 C. B. 104.

<sup>3</sup> *Missouri Pac. R. Co. v. McFadden*, 154 U. S. 155, 38 L. ed. 944.

<sup>4</sup> *Scars v. Wingate*, 3 Allen, 103; *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Fellows v. The R. W. Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *Hunt v. Mississippi Cent. R. Co.* 29 La. Ann. 446.

<sup>5</sup> *Lalande v. His Creditors*, 42 La. Ann. 705; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams v. Wilmington & W. R. Co.* 93 N. C. 42; *Dean v. King*, 22 Ohio St. 118.

<sup>6</sup> *Little Miami, C. & X. R. Co. v. Dodds*, 1 Cin. Super. Ct. 47.

of authority is on this side.<sup>1</sup> The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that this real and apparent authority—*i. e.*, the power with which his principal has clothed him in the character in which he is held out to the world—is the same, viz, to give bills of lading for goods received for transportation and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition, must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively or merely by mistake. A carrier is not precluded from denying that goods represented by a bill of lading were never received by it, where it accepted warehouse receipts as evidence of the shipper's goods, in the faith that they would be delivered.<sup>2</sup>

A railroad company is not estopped to deny that it had possession of cotton lying in the sheds or warehouse of a compress company,

<sup>1</sup> See 38 Am. Dec. 410, note to *Chandler v. Sprague*.

<sup>2</sup> *Hazard v. Illinois Cent. R. Co.* 67 Miss. 32.

for which it had issued bills of lading in exchange for receipts of the compress company, by reason of a statute prohibiting carriers from issuing bills of lading except for goods actually received into their possession.<sup>1</sup> A bill of lading issued by a station or shipping agent of a common carrier, without receiving goods for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value; and the carrier is not estopped by the bill from showing that no goods were in fact received.<sup>2</sup> The states in which a contrary rule has been adopted are New York, Kansas, Nebraska, apparently Illinois, and perhaps Pennsylvania.<sup>3</sup> Thus where defendant's agent, upon a forged warehouse receipt, issued bills of lading stating the receipt of certain articles consigned to the plaintiff in New York, and the agent was informed by the shipper that he intended to use them in banks, and he drew sight drafts on the plaintiff, which he attached to the bill of lading, which were paid on presentation, it was held that carrier was estopped from denying the receipt of the property.<sup>4</sup> And, where a carrier gives a bill of lading reciting that the property is then lying at a depot in a certain place, and agrees to forward the same to the consignee, and money is advanced on the bill of lading, the carrier cannot defeat the action for failure to deliver the goods by showing that, at the time of giving such bill of lading and its indorsement, the goods were in the adverse possession of another.<sup>5</sup>

The reasoning of these cases is in substance that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly

<sup>1</sup> *Martin v. St. Louis, I. M. & S. R. Co.* 55 Ark. 510.

<sup>2</sup> *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263, 44 Minn. 224.

<sup>3</sup> *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440; *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.* 20 Kan. 519; *Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556, 35 Am. Rep. 488; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529, 56 Am. Rep. 235.

<sup>4</sup> *Armour v. Michigan Cent. R. Co.* 65 N. Y. 111, 22 Am. Rep. 603.

<sup>5</sup> *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293.

within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person, who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. It is said that the carrier is estopped from denying the acts of its local freight agent with power to issue bills of lading, only upon actual receipt of the property for transportation, in fraudulently issuing bills of lading whereby third persons suffer damage by advances thereon.<sup>1</sup> It is urged that force is added to this reasoning in view of the fact that bills of lading are viewed and dealt with by the commercial world as quasi negotiable, and consequently it is desirable that they should be viewed with confidence and not distrust; and that for these considerations it is better to cast the risk of the goods not having been shipped upon the carrier, who has placed it in the power of agents of his own choosing to make these representations, rather than upon the innocent consignee or indorsee, who, as a rule, has no means of ascertaining the fact.

But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property, and that, if the statement in the receipt part of bills of lading issued by any of their numerous station or local agents is to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. And on questions of

<sup>1</sup> *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195, 60 Am. Rep. 440.

commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the Federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform to the doctrine of the Federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the Federal courts and another in the state courts, is of itself almost a sufficient reason why the latter adopt the doctrine of the Federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against citizens of the state by its own courts.

The overwhelming weight of authority, seems to sustain the rule that a bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake. Of course this is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before, or concurrent with, the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.<sup>1</sup>

<sup>1</sup> *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263, 44 Minn. 224.

§ 39. *Exceptions in Bill Waived by Negligence.*

While no exception of a private nature not contained in the contract of affreightment itself, can be an excuse for its nonperformance, and the carrier must furnish evidence to discharge itself for a failure to perform its contract,<sup>1</sup> yet that a common carrier may exempt himself from liability for loss occasioned by ordinary negligence has been held by many of the courts.<sup>2</sup> But these exemptions from liability by contract must be such only, under the strong current of authority as are just and reasonable in the eye of the law.<sup>3</sup>

A signed contract purporting to relieve a railway company from liability for every kind of negligence or default, however caused and however completely the loss may be unconnected with the fact of the goods being valuables, without any equivalent or beneficial alternative, will not avail the company under the English Railway and Canal Traffic Act, § 7, providing that the company shall be liable for the loss of any goods by the neglect or default of the company or its servants, in the absence of a signed and reasonable contract for exemption.<sup>4</sup>

In New York it has been held that a common carrier may stipulate the exemption from losses through his own negligence or that of his servants.<sup>5</sup> But contracts should not be held to include negligence from general words, nor will it be so construed unless expressed in unequivocal terms.<sup>6</sup> If the general words can be

<sup>1</sup> *Howland v. Greenway*, 63 U. S. 22 How. 491, 16 L. ed. 391.

<sup>2</sup> *Ante*, chap. II. See also, *Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *Ashmore v. Pennsylvania Steam Towing Transp. Co.* 28 N. J. L. 180; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63; *Peck v. Weeks*, 34 Conn. 145; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *American Exp. Co. v. Perkins*, 42 Ill. 458; *Munn v. Birchard*, 40 Vt. 326; *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec 567.

<sup>3</sup> Stat. 17 & 18 Vict. chap. 31, § 7; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473, 493; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, 10 Am. Rep. 366, *note*; *Ante*, chap. II. § 10 *et al.*

<sup>4</sup> *Shaw v. Great Western R. Co.* [1894] 1 Q. B. 373.

<sup>5</sup> *Maguin v. Dinsmore*, 56 N. Y. 168; *Poucher v. New York Cent. R. Co.* 49 N. Y. 263, 10 Am. Rep. 364; *Knell v. United States & B. SS. Co.* 1 Jones & S. 423.

<sup>6</sup> *Myrard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28, reversing 7 Hun, 399; *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 370.



given effect without including negligence, the contract will not release from it.<sup>1</sup> In those states where it is admitted that the carrier may exempt itself from the negligence of its servants, the contract securing such exemption must be in explicit terms.<sup>2</sup> The carrier remains liable for loss through its negligence, under a contract of shipment of fruit providing that the same shall be at the owner's risk, where the contract does not in clear and unmistakable terms exempt it from such liability.<sup>3</sup> A special contract stamped upon a bill of lading is not so certain and specific as is required to free the carrier from liability.<sup>4</sup> The words in a bill of lading "not accountable for contents," do not constitute an agreement for exemption from liability.<sup>5</sup> Provisions in a contract of affreightment, that the carrier will not be responsible for delay in the transit of the property, do not relieve it from the consequences of delay occasioned by its negligence, where exemption from liability from that cause is not expressed in the contract.<sup>6</sup> Although excused by an exception for delay, yet he will be liable for injury to the goods by negligent handling while so delayed.<sup>7</sup> If the delay is excused, the carrier is not liable for decline in price of cargo,<sup>8</sup> nor for loss in quality.<sup>9</sup>

<sup>1</sup> *Holsapple v. Rome, W. & O. R. Co.* 86 N. Y. 275; *Mynard v. Syracuse, B. & N. Y. R. Co.* *supra*.

<sup>2</sup> *Magnin v. Dinsmore*, 56 N. Y. 168; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 661; *Westcott v. Fargo*, 6 Lans. 319; *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Holsapple v. Rome, W. & O. R. Co.* 86 N. Y. 275; *French v. Buffalo, N. Y. & E. R. Co.* 4 Keyes, 108; *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 370; *Cainfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271; *Mobile & O. R. Co. v. Jarboe*, 41 Ala. 644; *Bostwick v. Baltimore & O. R. Co.* 45 N. Y. 712; *Guillaume v. Hamburg & A. Pucket Co.* 42 N. Y. 212, 1 Am. Rep. 512; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Kansas City, M. & B. R. Co. v. Holland*, 68 Miss. 351.

<sup>3</sup> *Giles v. Fargo*, 43 N. Y. S. R. 65.

<sup>4</sup> *Merriman v. The May Queen*, Newb. Adm. 464; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 330, 21 L. ed. 303; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 88, 93 Am. Dec. 208.

<sup>5</sup> *The Pacific, Deady*, 17.

<sup>6</sup> *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438.

<sup>7</sup> *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Lipford v. Charlotte & S. C. R. Co.* 7 Rich. L. 409.

<sup>8</sup> *Black v. Baxendale*, 1 Exch. 410; *Nettles v. South Carolina R. Co.* 7 Rich. L. 190, 62 Am. Dec. 409.

<sup>9</sup> *Glasscock v. Chicago & A. R. Co.* 69 Mo. 589.

But, although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is, nevertheless, bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contributed thereto, he would be liable therefor.<sup>1</sup> Ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause.<sup>2</sup> A stipulation releasing a carrier from damages that "might happen" will not release it from the effect of negligence or misconduct.<sup>3</sup> A carrier who receives a cask of wine in good order to transport, and the cask reaches its destination empty, is liable for the loss unless he shows an exemption under his bill of lading.<sup>4</sup> A special contract providing that plaintiff "shall accept the cars provided by the company," does not exempt from liability for injuries to the goods shipped resulting from defective cars.<sup>5</sup> Provisions in a contract of affreightment, that the carrier will not be responsible for delay in the transit of the property, do not relieve it from the consequences of delay occasioned by its negligence, where exemption from liability from that cause is not expressed in the contract.<sup>6</sup>

If a shipper of machinery agrees that it may be transported upon open cars, the carrier may still be liable for damage by rust or by the weather during a detention on the road, if ordinary diligence required the carrier to cover the cars during such detention and it fails to do so.<sup>7</sup> Limitations in a contract of shipment upon the liability of the carrier are rendered inoperative and the carrier is subject to its full common law liability as an insurer, where it deviates from the contract by carrying the property by freight, instead of complying with the provision that it shall be

<sup>1</sup> *Holladay v. Kennard*, 79 U. S. 12 Wall. 254, 20 L. ed. 390.

<sup>2</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Beard v. Illinois Cent. R. Co.* 7 L. R. A. 280, 79 Iowa, 518.

<sup>3</sup> *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659.

<sup>4</sup> *Arend v. Liverpool, N. Y. & P. SS. Co.* 6 Lans. 457, 64 Barb. 118, affirmed in 53 N. Y. 606.

<sup>5</sup> *Wallingford v. Columbia & G. R. Co.* 26 S. C. 258.

<sup>6</sup> *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98.

<sup>7</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

carried by passenger train service.<sup>1</sup> A contract releasing a carrier from all damage to goods from any cause not the result of collision or cars being thrown off the track, does not release from liability for negligence not resulting in collision or derailment.<sup>2</sup> A provision in a shipping contract, that the carrier in case of loss shall have the benefit of any insurance effected by the shipper, does not apply to a loss from the carrier's negligence, where the policy expressly provides that it shall not cover the carrier's common law liability, although it provides for advancing to the shipper the insured value of the goods, to be repaid upon a recovery against the carrier.<sup>3</sup> In courts where contracts releasing liability for negligence are not given effect, the exception is of no avail in favor of a permitted exemption, where customary precautions are not shown. Thus, a vessel which did not take the usual and necessary precautions against damage by rats to a cargo known to be liable thereto, during a voyage of ordinary duration in which only the customary stops were made, is liable for extraordinary damage thereto, notwithstanding exceptions in the bill of lading as to vermin and negligence.<sup>4</sup>

When unable to carry the goods to their place of destination from causes over which he has no control, as by the stranding of the vessel, the master is still bound to take all possible care of the goods, and is responsible for perils or injury which might have been prevented by human skill and prudence.<sup>5</sup> But the carrier is only answerable for the ordinary and proximate consequences of neglect, and not for those that are remote and extraordinary.<sup>6</sup> When owing to defective machinery, goods did not arrive for six days after they were due, and then were destroyed by a flood, the court said: "The negligence of the carrier was remote; it had ceased to operate as an active, efficient and prevailing cause as soon as the wool had been carried beyond Syra-

<sup>1</sup> *Pavitt v. Lehigh Valley R. Co.* 153 Pa. 302.

<sup>2</sup> *Phoenix Clay Pot Works v. Pittsburg & L. E. R. Co.* 139 Pa. 234.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605.

<sup>4</sup> *The Timor*, 46 Fed. Rep. 859.

<sup>5</sup> *The Niagara v. Cordez*, 62 U. S. 21 How. 7, 16 L. ed. 41.

<sup>6</sup> *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695.

cuse, and therefore cannot subject the carrier to a responsibility for an injury to the property resulting from a subsequent inevitable accident, which was the proximate cause by which it was produced.<sup>1</sup> In a case decided by the supreme court of New York, where the liability of the carrier was maintained, the damage being occasioned by a flood, the decision was placed expressly upon the gross neglect of the company.<sup>2</sup> Though the proximate cause may be occasioned by inevitable accident, the carrier is still bound to use care and diligence. Yet no greater foresight of extraordinary perils is expected of him than of other men, and no greater penalty visited for his failure. When he discovers himself in peril the law requires of him ordinary care, skill and foresight. This is defined to be the common judgment, which men of prudence and heads of families, usually exhibit in matters that are interesting to them. It means, as difficulties increase—in great danger—great care is the ordinary care of a prudent man.<sup>3</sup>

#### § 40. *Effect of Exception in Bill.*

The printed part of a bill of lading is controlled by the written part.<sup>4</sup> for the bill of lading is a contract which must be construed by the court like any other written contract,—according to its true meaning.<sup>5</sup> The ordinary rule is that the validity of a contract, its interpretation, nature and obligation, is to be governed by the law of the place of performance; the contract being invalid there, will be so treated in other jurisdictions. If a contract is entire, and made to be particularly performed in one state, it must be interpreted in accordance with the laws of that state.<sup>6</sup> But a stipulation of a bill of lading, substituting for the law of the United States that of Great Britain in respect to the validity of a stipulation relieving a carrier from liability for the negligence of its servants,

<sup>1</sup> *Denny v. New York Cent. R. Co.* 13 Gray, 487, 74 Am. Dec.

<sup>2</sup> *Michaels v. New York Cent. R. Co.* 30 N. Y. 575, 86 Am. Dec. 4.

<sup>3</sup> *Morrison v. Davis*, *supra*.

<sup>4</sup> *Miller v. Hannibal & St. J. R. Co.* 24 Hun, 607; *Elkins v. Empire Transp. Co.* 81\* Pa. 315.

<sup>5</sup> *Lucesco Oil Co. v. Pennsylvania R. Co.* 2 Pittsb. 477.

<sup>6</sup> *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412.

is, with the latter stipulation, invalid in the courts of the United States.<sup>1</sup>

A common carrier cannot legally exact an agreement limiting its liability as a condition precedent to receiving or carrying the offered freight or message. It is under a legal duty to accept and carry whatever is offered to it at a reasonable time and place, of a kind that it undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless such liability is restricted by a valid agreement between such carrier and its employer.<sup>2</sup> No greater operation will be given to a contract limiting the liability of a carrier, than the language used plainly indicates that the parties intended it should have.<sup>3</sup> But where a loss occurs from one of the perils clearly excepted in a bill of lading delivered to the shipper and accepted by him, and the carrier has acted under the bill, as delivered, no recovery can be had for the loss.<sup>4</sup> And exceptions permissible in the bill of lading, exempting the carrier for loss from certain causes, are in New York conclusive upon the shipper as a special contract between the parties, where the bill was delivered to the carrier.<sup>5</sup> The enemies mentioned in the bill of lading, are to be understood as public enemies, not merely robbers, thieves or private depredators, but losses by pirates on the high seas are deemed within it.<sup>6</sup> An exception clause in a bill of lading, by which a ship is exempted from liability in respect of losses caused by (*inter alia*) "pirates, robbers or thieves of whatever kind, whether on board or not, or by land or sea," does not apply to thefts committed by persons in the service of the ship.<sup>7</sup> But a railway company may protect itself by special contract against liability for loss of goods by the theft of

<sup>1</sup> *The Hugo*, 57 Fed. Rep. 403.

<sup>2</sup> *Kirby v. Western U. Teleg. Co.* (S. D.) 55 N. W. Rep. 759.

<sup>3</sup> *Menzell v. Chicago & N. W. R. Co.* 1 Dill. 531.

<sup>4</sup> *Bostwick v. Baltimore & O. R. Co.* 55 Barb. 137.

<sup>5</sup> *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673.

<sup>6</sup> *Barclay v. Hygena*, cited 1 T. R. 33, reported under the name of *Barclay v. Cuculla Y Gana*, 3 Dougl. 389; *Morse v. Slue*, 1 Vent. 190, 238; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127, 4 Dougl. 287; *Coggs v. Bernard*, 2 Ld. Raym. 909-918; *Woodlife's Case*, Moore, 462, 1 Rolle, Abr. 2.

<sup>7</sup> *Steinman v. Angier Line* [1891] 1 Q. B. 619.

its servants without negligence on its part, although such contract is not reasonable within the English Railway and Canal Traffic Act, § 7, providing that a railway company shall be liable, in the absence of a signed and reasonable contract for exemption, for the loss of any goods, occasioned by the neglect or default of such company or its servants, since such loss is not a loss occasioned by the neglect or default of such company or its servants.<sup>1</sup>

In a recent case decided by the supreme court of Pennsylvania<sup>2</sup> the defendant is sued as a common carrier for its failure to deliver a quantity of whiskey shipped over its line of road. The bill of lading stipulated that, "the carrier shall not be liable for loss or damage by causes beyond its reasonable control, by fire, explosion from any cause, and wheresoever occurring; by riots, strikes, or stoppage of labor, or for any of the causes incident to transportation, such as chafing, heating, freezing, leakage, rust, or any other reason not directly traceable to the negligence of the carrier's servants." The defense set up is that the whiskey was lost in the Johnstown flood. The train was overtaken by the flood, but it was not swept away. After the avalanche of water caused by the breaking of the South Fork dam had passed, the train was left upon the track, and the cars were uninjured. The track above and below it were injured, so that the train could not resume its journey at once, but remained in the same place until the necessary repairs were made. The whiskey claimed for was not destroyed by a flood. Part of it was stolen by thieves after the flood subsided, and the rest of it was destroyed by a volunteer guard of citizens, who had watched and protected the train during the night following the flood and part of the next day, as the easiest way of keeping it from falling into the hands of the same dangerous class of men who had gotten a taste of it on the previous afternoon. The flood was therefore not the cause of the loss, but the occasion the opportunity for its plunder by bad men. The thieves came in the wake of the flood to pick up and appropriate what the more merciful waters had spared. They came to this train, and began to force open the doors of some of the cars.

<sup>1</sup> *Lang v. Pennsylvania R. Co.* 20 L. R. A. 360, 154 Pa. 342.

<sup>2</sup> *Snow v. Great Western R. Co.* [1894] 1 Q. B. 373.

The conductor, and part, if not all, of his crew, came upon the ground at about the same time. They saw an ax being used to open one or more of the cars, but they made no effort to defend the train or drive away the thieves. They did not so much as to remonstrate with them, or order them away, but, turning their backs, they surrendered the train and its freight to the tender mercies of the vagabonds who had attacked it, and went away from the neighborhood. Private citizens came soon after, drove the thieves out of and away from the train, and stood guard over it all night and until the middle of the next day; but the trainmen seem to have had neither part nor lot in the effort to save the property of their employer. The reason was given by one of them while on the witness stand with a cool, deliberate heartlessness not often met with in the most hardened criminals. He said he did not try to help the citizens save the cars and their contents because he "had no orders to do so." He stood and looked on. He saw the peril of his employer's property. He saw citizens, with no personal interest involved, trying to save it, but he did not help, because "he had no orders." Whether he and others like him were cowards shivering with fear in the presence of a few thieves, whom unarmed citizens drove away, or were thieves at heart, and in full sympathy with those who were trying to loot the cars that they should have defended, the court say, is a matter of no consequence. In either case they neglected their obvious duty. The railroad company was represented in the carriage and safe keeping of the freight on the train by the men to whom the train had been committed. If they deserted their posts, and left the goods uncared for, and they were stolen or destroyed, their employer must suffer for their inefficiency. Under the facts the loss sued for did not arise from inevitable accident or the act of God. It did not result from insurrection or the public enemy. It was not the work of a mob. It was due in part to plain stealing, done in daylight, in the presence of the trainmen, and without the slightest resistance or remonstrance on their part. For the rest, it was due to the action of citizens who, after having guarded what remained for nearly twenty-four hours, destroyed it, when they could no longer keep up their watch over it, rather

than see it consumed by the human brutes to whom it had been abandoned by the trainmen.

The words "taken at the owner's risk" only release the carrier from its liability as an insurer.<sup>1</sup> A clause in the bill of lading, exempting the carrier from loss on perishable property, cannot be applied to mature merchantable corn.<sup>2</sup> A stipulation requiring notice of any claim for damages before removal of the property from the place of destination, does not apply to a removal by the carrier.<sup>3</sup> Although a bill of lading of olive oil from *Ætna* to New York, exempted the carrier from responsibility from breakage or leakage, where it was shown that the libelant had long been accustomed to import such olive oil from the same place of origin in Italy, and from the same consignors, put up in the same manner, and no similar leakage had before occurred, and the cases were shipped in good condition, and the loss which occurred was evidently caused by some person tampering with the cases for the purpose of extracting oil, while the cases were in the carrier's custody—the carrier is responsible.<sup>4</sup>

A clause in a bill of lading that the vessel is not responsible for the number of pieces or the weight, removes the ship's presumptive liability for the weight as stated in the bill of lading, and she is liable only for the number of pounds proved to have actually been put on board.<sup>5</sup> But a clause in a bill of lading, whereby the carrier agrees that any deficiency in the cargo shall be paid for by him and deducted from the freight, concludes him as to the amount therein stated to have been delivered to him for shipment, and as to the right to deduct from freight charges for deficiency in the quantity delivered at the destination, in the absence of proof of fraud or mistake at the place of lading.<sup>6</sup> An

<sup>1</sup> *Mobile & O. R. Co. v. Jarboe*, 41 Ala. 644; *Goldey v. Pennsylvania R. Co.* 30 Pa. 242, 72 Am. Dec. 703.

<sup>2</sup> *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

<sup>3</sup> *Baker v. Missouri Pac. R. Co.* 34 Mo. App. 98.

<sup>4</sup> *The Giglio v. The Britannia*, 31 Fed. Rep. 432.

<sup>5</sup> *Eaton v. Neumark*, 32 Fed. Rep. 891; *Abbott v. National S.S. Co.* 33 Fed. Rep. 895.

<sup>6</sup> *Rhodes v. Newhall*, 35 N. Y. S. R. 415, affirmed in 126 N. Y. 574.



exception in the bill of lading, releasing the carrier from deficiency "in packages"—has no application to the shipment of corn in bulk.<sup>1</sup> The term "31 bars on ship" in a bill of lading, means so many less the number previously stated.<sup>2</sup>

Where the master stamps the bill of lading "weight unknown," the presumption arising from the weights stated on the margin of the bill of lading is removed.<sup>3</sup> The words "contents unknown" annexed to a bill of lading acknowledging the receipt of the goods in good order, imply that the master intends to confine the acknowledgment to the external condition of the goods.<sup>4</sup> A bill of lading expressly stating that the contents of the packages are unknown is no warranty of the quality of the goods described therein, and binds the carrier only for the safe delivery of the goods which he actually receives for transportation.<sup>5</sup> A recital in a bill of lading of casks enveloped in linen covers, that they are "in apparent good order and condition," refers only to the linen covers, and creates no presumption as to the degree of strength of any particular cask.<sup>6</sup> The words, "all other conditions as per charter," in a bill of lading for delivery of goods, "the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said goods, and all other conditions as per charter, with average accustomed,"—do not incorporate into the bill of lading the exception of "strandings occasioned by the negligence of the master," which exception is contained in the charter-party; and therefore indorsees of the bill of lading, who are strangers to the charter-party are not affected by the latter exception.<sup>7</sup>

<sup>1</sup> *McCoy v. Erie & W. Transp. Co.* 42 Md. 498.

<sup>2</sup> *Abbott v. National SS. Co.* 33 Fed. Rep. 895.

<sup>3</sup> *Matthiessen & W. Sugar Ref. Co. v. Gusi*, 29 Fed. Rep. 794.

<sup>4</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985.

<sup>5</sup> *St. Louis, I. M. & S. R. Co. v. Knight*, 122 U. S. 79, 30 L. ed. 1077; *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 352.

<sup>6</sup> *Roth v. Hamburg-American Packet Co.* 27 Jones & S. 49.

<sup>7</sup> *Serraino v. Campbell*, L. R. 25 Q. B. Div. 501, affirmed in [1891] 1 Q. B. 283.

The exception in a bill of lading, of "steam boilers, machinery, or defects therein," inserted in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of a voyage, does not affect the warranty of seaworthiness at the time of leaving port.<sup>1</sup> A clause in a bill of lading excepting loss from "restraint of princes, rulers, or people," and also from prolongation of the voyage "by causes beyond the carrier's control," covers quarantine detention.<sup>2</sup> An exemption from a shipowner's liability for injury to cargo by negligence of persons in the service of the ship, whether "in navigating the ship or otherwise," and loss or damage arising from rain, storage, or contact with other goods, includes damage to goods after being placed on board, by reason of negligently exposing them to rain and contact with other wet goods. The words "or otherwise" are not confined to damages in navigating the ship, or something akin thereto.<sup>3</sup> Bills of lading purporting to exempt the owner from liability for "collision, . . . even when occasioned by the negligence of the master or other servants of the shipowners," do not exempt from risks of damage from all other vessels and other masters and servants of the same owners, who had nothing to do with the contract of transportation.<sup>4</sup>

Without such condition or where it is not recognized as valid, where a loss arises from collision, if his own vessel, or if both vessels are at fault, the carrier is liable. If the other vessel is wholly or if their vessel is at all in fault, it is a "peril of the sea." A carrier is liable unless exempted by contract.<sup>5</sup> "Blowing" as an exception will protect the carrier from "blowing" of bilge

<sup>1</sup> *The Caledonia*, 43 Fed. Rep. 681.

<sup>2</sup> *The Bohemia*, 38 Fed. Rep. 756.

<sup>3</sup> *Norman v. Binnington*, L. R. 25 Q. B. Div. 475.

<sup>4</sup> *The Britannic*, 39 Fed. Rep. 395.

<sup>5</sup> *Converse v. Brainerd*, 27 Conn. 607; *Grill v. General Iron Screw Colliery Co.* L. R. 1 C. P. 600; *Jones v. Pitcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Whitesides v. Thurlkill*, 12 Smedes & M. 599, 51 Am. Dec. 123; *The New Jersey*, Olcott, 444; *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627; *Marsh v. Blythe*, 1 McCord, L. 360; *Buller v. Fisher*, 3 Esp. 67; *Paisted v. Boston & K. S. Nav. Co.* 27 Me. 132, 46 Am. Dec. 587.

water.<sup>1</sup> So, a loss from sweating or over-heating may be exempted.<sup>2</sup> "Leakage" which applies to the cargo, is a proper exemption, if there is no failure on the part of the carrier in properly stowing.<sup>3</sup> Leaking from other goods, however, and injuring a portion of the cargo, does not come within the exemption.<sup>4</sup>

<sup>1</sup> *East Tennessee, V. & G. R. Co. v. Wright*, 76 Ga. 533.

<sup>2</sup> *Wolff v. The Vaderland*, 18 Fed. Rep. 733; *The Portuense*, 35 Fed. Rep. 670; *Matthiessen & W. Sugar Ref. Co. v. Gusi*, 29 Fed. Rep. 794.

<sup>3</sup> *Hill v. Sturgeon*, 28 Mo. 323; *Marx v. The Britannia*, 34 Fed. Rep. 906; *Evans v. Spreckels*, 45 Fed. Rep. 265.

<sup>4</sup> *Thrift v. Youle*, L. R. 2 C. P. Div. 434.

## CHAPTER VI.

### "ACT OF GOD"—"PERILS OF THE SEA"—"FIRE CLAUSE"— NEGLIGENCE—PRESUMPTIONS.

- § 41. *"Act of God," what Constitutes.*
- § 42. *Inevitable Accident Not Resulting from Natural Causes.*
- § 43. *"Perils of the Sea;" "Dangers of the River," "of Lakes,"  
"of Waters," or "of Navigation."*
- § 44. *When "Act of God" or other Inevitable Cause No Excuse.*
- § 45. *"Fire Clause."*
- § 46. *Statutory Provisions Regarding "Fire Clause."*
- § 47. *Goods in Transit or Depot—"Fire Clause."*
- § 48. *Negligence Defeats "Fire Clause."*
- § 49. *Burden of Proof for Loss Under Exceptions.*

#### § 41. *"Act of God," what Constitutes.*

Such inevitable accidents as cannot be prevented by human care, skill or foresight, but which result from natural causes, such as lightning and tempest, floods and inundations, are termed the acts of God.<sup>1</sup> All causes of inevitable accident may be divided into two classes, those which are occasioned by the elementary forces of nature unconnected with the agency of man, whether in acts of commission or omission, of nonfeasance or misfeasance, or from any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "Act of God" to the latter class of inevitable accidents. It is equally clear that storm and tempest belong to the class to which the term "Act of God" is properly applicable. An accident is an occurrence which happens unexpectedly from uncontrollable operations of nature alone, and without human agency,

<sup>1</sup> Anderson, Law Dict. 23, citing *McHenry v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 449; *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 289, 18 Am. Rep. 613; *Fergusson v. Brent*, 12 Md. 33, 71 Am. Dec. 582; *The Carlotta*, 9 Ben. 6.

or resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both.<sup>1</sup>

While the act of God will excuse the nonperformance of a duty created by law, it will not excuse a duty created by contract.<sup>2</sup> Where a duty is imposed upon a person by law, he will not be absolved from liability for nonperformance occasioned by an act of God, unless he has expressly stipulated for the exemption.<sup>3</sup> There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance, and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens.<sup>4</sup>

A common carrier is bound safely to carry the goods to their destination, unless prevented by some cause arising from irresistible force, over which he has no control and which cannot be guarded against by the watchful exertion of human skill and prudence.<sup>5</sup> No matter what degree of prudence may be exercised by the carrier and his servants, although the delusion by which it is baffled, or the force by which it is overcome is inevitable, yet, if it be the result of human means, the carrier is responsible.<sup>6</sup>

<sup>1</sup> *Morris v. Platt*, 32 Conn. 85.

<sup>2</sup> *Meriwether v. Lowndes County*, 89 Ala. 362.

<sup>3</sup> *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep. 441.

<sup>4</sup> *Chicago, M. & St. P. R. Co. v. Hoyt*, 149 U. S. 1, 37 L. ed. 625.

<sup>5</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 24, 16 L. ed. 46; *Gordon v. Buchanan*, 5 Yerg. 71; *Oakley v. Port of Portsmouth & R. U. S. Packet Co.* 34 Eng. L. & Eq. 530.

<sup>6</sup> *McArthur v. Sears*, 21 Wend. 196; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127; *Campbell v. Morse*, 1 Harp. L. 468; *Charleston & C. S. B. Co. v. Bason*, 1 Harp. L. 262; *The Niagara v. Cordes*, 62 U. S. 21 How. 26, 16 L. ed. 47. See *Read v. Spaulding*, 30 N. 630, 86 Am. Dec. 426.

*Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645, is not against these cases, because the court there held that when the damages by flood occurred, the defendants no longer held the goods as common carriers. The expression "Act of God" denotes natural accidents such as lightning, earthquake and tempest, and not accidents resulting from the negligence of man. There is a nicety of distinction between the act of God and inevitable necessity.<sup>1</sup> An earthquake is an act of God.<sup>2</sup> Carriers by water are liable in all the strictness and extent of the rule unless the loss happens by one of the accepted perils, with no act of negligence contributing thereto.<sup>3</sup> But where the injury can be apportioned to each cause, this is done.<sup>4</sup> Loss by flood or storm is loss by the act of God, and a common carrier is excused when damages result from this cause immediately.<sup>5</sup> But delay by low water will not excuse failure to deliver from loss by fire while the goods are stored.<sup>6</sup> A snow storm of such violence as to prevent the moving of trains is an act of God which will exempt a carrier from liability for loss of or damage to property shipped, occasioned thereby without the carrier's fault.<sup>7</sup> A carrier is not responsible for delay on the voyage on account of disastrous weather or adverse winds, low tides or the like, over which he has no control.<sup>8</sup> An unexpected freshet or inundation which causes delay or loss is within the exception to the carrier's liability.<sup>9</sup> A storm,

<sup>1</sup> *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 T. R. 27; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; Story, Bailm. §§ 511, 525.

<sup>2</sup> *Slater v. South Carolina R. Co.* 29 S. C. 96.

<sup>3</sup> *The Costa Rica*, 3 Sawy. 540; *Gulf, C. & S. F. R. Co. v. McCorquodale*, 71 Tex. 41; *Spencer v. Daggett*, 2 Vt. 92; *Elliott v. Rossell*, 10 Johns. 1, 6 Am. Dec. 306; *Kemp v. Coughtry*, 11 Johns. 107; *McArthur v. Sears*, 21 Wend. 193; *Bills v. New York Cent. R. Co.* 84 N. Y. 5; *General Mut. Ins. Co. v. Sherwood*, 51 U. S. 14 How. 351, 14 L. ed. 452; *Astrup v. Lewy*, 19 Fed. Rep. 536; *Washington & G. R. Co. v. Varnell*, 98 U. S. 479, 25 L. ed. 233; Story, Bailm. §§ 497, 510, and notes.

<sup>4</sup> *Illinois Cent. R. Co. v. Owens*, 53 Ill. 391.

<sup>5</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

<sup>6</sup> *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145.

<sup>7</sup> *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197; *Memphis & C. R. Co. v. Reeves*, *supra*.

<sup>8</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 18 L. ed. 985.

<sup>9</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Wal-*

flood or freshet, to constitute an act of Providence, need not be unprecedented, if it is unusual, extraordinary and unexpected.<sup>1</sup> A carrier which has provided a place for storage is not liable for damage caused by a flood such as occurs but twice in a generation.<sup>2</sup> The fact that such a flood had occurred once in each of two preceding years, is not sufficient to make the carrier liable.<sup>3</sup> Losses occasioned by the freezing up of canals and rivers are to be attributed to the act of God.<sup>4</sup> A collision, will not excuse the loss of goods on the ground that it is an “Act of God.”<sup>5</sup> Of course, if the collision is caused by a tempest, it is the tempest to which the loss must be attributed, and not the collision.<sup>6</sup> But, a rain of not unusual violence, and the result thereof, in the softening of the superficial earth, have not been so construed.<sup>7</sup> Sudden deaths and illnesses have been held to be “acts of God.”

*lace v. Clayton*, 42 Ga. 443; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Lipford v. Charlotte & S. C. R. Co.* 7 Rich. L. 409; *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271.

<sup>1</sup> *People v. Utica Cement Co.* 22 Ill. App. 159; *Smyrl v. Nolon*, 2 Bail. L. 421, 23 Am. Dec. 146; *Faulkner v. Wright*, 1 Rice, L. 107.

<sup>2</sup> *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106.

<sup>3</sup> *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182.

<sup>4</sup> *Bozman v. Teall*, 23 Wend. 306; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Harris v. Rand*, 4 N. H. 259, 17 Am. Dec. 421; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745.

<sup>5</sup> *Amies v. Stevens*, 1 Strange, 128; *Plaisted v. Boston & K. S. Nav. Co.* 27 Me. 133, 46 Am. Dec. 587.

<sup>6</sup> *Amies v. Stevens*, *supra*. See *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627. As to extraordinary floods, see *Nashville & C. R. Co. v. King*, 6 Heisk. 269; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594. Storms of unusual violence, *Blythe v. Denver & R. G. R. Co.* 11 L. R. A. 615, 15 Colo. 333. For sudden tempests and snow storms, examine *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197; *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451; *Chapin v. Chicago, M. St. P. R. Co.* 79 Iowa, 582. For severe frosts, consult *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Bozman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562; *Harris v. Rand*, 4 N. H. 259, 17 Am. Dec. 421, and for great drouths, lightnings, earthquakes, refer to *Slater v. South Carolina R. Co.* 29 S. C. 96.

<sup>7</sup> *Gleason v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458; *Smith v. Shepherd*, Abbott, Shipping, 383; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292.

## § 42. *Inevitable Accident Not Resulting from Natural Causes.*

By unavoidable accident, in legal phraseology, is not meant an accident which it was physically impossible in the nature of things to prevent, but merely that it was not occasioned in any degree, either remotely or directly, by want of care or skill, such as the law holds every man bound to exercise.<sup>1</sup> It is an occurrence which was not anticipated by the parties when the contract was entered into, and which gives an undue advantage to one of them over the other in a court of law.<sup>2</sup>

The definition limiting the term "accident" to the elementary forces of nature, was objected to as too narrow by Judge Story, who says that by the term "accident" is intended, not merely inevitable casualty or the act of Providence, or what is technically *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions as are not the result of any negligence or misconduct in the party affected thereby.<sup>3</sup> When a casualty occurs which might have been prevented by the use of known and proper means, it is not "inevitable" accident.<sup>4</sup> An "inevitable accident" is distinguishable from "an act of God," as the collision of two vessels in the dark which is an "inevitable" accident not resulting from natural causes but by the agency of man.<sup>5</sup> "An opinion characterized by fine discrimination and by accurate research."<sup>6</sup> Carriers are not liable for injuries arising from inevitable accident.<sup>7</sup> An error of judgment *in extremis* is not a fault.<sup>8</sup> A mere error of judgment in the excitement of a

<sup>1</sup> *Dygert v. Bradley*, 8 Wend. 473, citing *Wakeman v. Robinson*, 1 Bing. 213.

<sup>2</sup> 3 Jeremy, Eq. Jur. pt. 2.

<sup>3</sup> 1 Story, Eq. § 78, criticised in 2 Pom. Eq. 823, where it is defined as follows: "It is an unforeseen and unexpected event, occurring externally to the party affected by it, and of which his own agency is not the proximate cause." 2 Pom. Eq. 285; Smith, Eq. Jur. 36; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742.

<sup>4</sup> *Ladd v. Foster*, 31 Fed. Rep. 827.

<sup>5</sup> *Alliance Ins. Co. v. The Morning Light*, 69 U. S. 2 Wall. 560, 17 L. ed. 864; *Fergusson v. Brent*, 12 Md. 33, 71 Am. Dec. 582.

<sup>6</sup> 1 Smith, Lead. Cas. 413.

<sup>7</sup> See note to *Palmer v. Pennsylvania Co.* (N. Y.) 2 L. R. A. 252.

<sup>8</sup> *The Osceola*, 33 Fed. Rep. 719.



peril *in extremis*, the peril being caused by the other vessel, is not a fault.<sup>1</sup> The defense of inevitable accident set up as the cause of a collision implies that the accident was not avoidable by the exercise of all reasonable precautions, adequate to the emergency.<sup>2</sup> Where a steam tug had caught upon a gas pipe negligently exposed on the bottom of a river, the waters of which were rapidly falling, endangering the safety of a vessel, and the opinion of experienced persons employed by the vessel, apprehended danger in the attempt to ward the vessel off the obstacle, they were not to be held responsible for a mere mistake of judgment.<sup>3</sup> Collision between two schooners sailing in thick foggy weather with a fresh wind from the southwest, both maintaining a vigilant lookout and frequent signals by horn, and both having the same general course, and being closehauled, one being at the time on her starboard tack headed southeast by south and the other on her port tack headed southwest, neither being able to see or hear the other till immediately before the collision, when they both acted promptly and came to the starboard—is inevitable accident.<sup>4</sup> Where the lookout of respondent who ran into a vessel having the right of way divided his attention between looking out and reefing sail, respondent's plea of inevitable accident should not be sustained.<sup>5</sup>

§ 43. "*Perils of the Sea;*" "*Dangers of the River,*" "*of Lakes,*" "*of Waters,*" or "*of Navigation.*"

The common law liability is usually limited by the contract contained in the bill of lading, and "perils of the sea," "dangers of the sea," or "dangers of rivers or of the lakes or of water or of navigation," which are held the same in their effect are usually excepted.<sup>6</sup> "Perils of the sea" includes such losses only as are

<sup>1</sup> *The City of Springfield*, 29 Fed. Rep. 923.

<sup>2</sup> *The Nacoochee*, 24 Blatchf. 99, 28 Fed. Rep. 462.

<sup>3</sup> *Omslaer v. Philadelphia Co.* 31 Fed. Rep. 354.

<sup>4</sup> *The Rebecca Shepherd*, 32 Fed. Rep. 926.

<sup>5</sup> *The Twenty-one Friends*, 33 Fed. Rep. 190.

<sup>6</sup> Story, Bailm. §§ 512 *et seq.*; *Hastings v. Pepper*, 11 Pick. 41; *Bell v. Reed*, 4 Binn. 127; *Hollingsworth v. Brodrick*, 7 Ad. & El. 50; *Jones v. Patcher*, 3 Stew. & P. (Ala.) 135, 24 Am. Dec. 716; *Gordon v. Buchanan*, 5 Yerg. 71; *Fairchild v. Slocum*, 19 Wend. 329, 7 Hill, 292; *Baxter v. Leland*, 1 Abb. Adm. 348.

of an extraordinary nature or arise from irresistible force or from some overwhelming power which cannot be guarded against by the ordinary exercise of skill and prudence.<sup>1</sup> Of course the carrier may render himself liable for all such inevitable accidents by contract.<sup>2</sup> But these words are evidently of broader compass than the words, "Act of God," and although it was supposed, by a very learned judge, that they were but commensurate;<sup>3</sup> and, therefore, whatever was a peril of the sea, would excuse the carriers acting under his general liability, yet, it is evident, under the authorities, that they are not always so. The distinction was adverted to, but not much examined by Story, J., in *The Reeside*, 2 Sumn. 571. But perils of the sea do not include the violence of mobs and depredators, other than pirates, or loss from theft, embezzlement or robbery, whether committed by strangers, or by the crew or passengers,<sup>4</sup> and the collision of ships without the fault of either party.<sup>5</sup>

Where a collision occurs without the fault of the carrier, he is entitled to avail himself of the loss resulting to his cargo, under the term "dangers of navigation."<sup>6</sup> The exceptions of the "dangers of the river" include risks arising from natural accidents peculiar to the river, which do not happen by the intervention of man, nor are to be prevented by human prudence; and have been extended to comprehend losses arising from some irresistible force or overwhelming power, which no ordinary skill could anticipate or evade. They exonerate the carrier from a liability for a loss arising from an attack of pirates, or from a collision of ships

<sup>1</sup> 3 Kent, Com. 299; Story, Bailm. § 512, a; *The Reeside*, 2 Sumn. 567; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197; *Waters v. Merchants Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Fairchild v. Slocum*, 19 Wend. 329; *Hazard v. New England M. Ins. Co.* 1 Sumn. 218, 33 U. S. 8 Pet. 557, 8 L. ed. 1043; *Colt v. McMecken*, 6 Johns. 160, 5 Am. Dec. 200. For the distinction between "perils of the sea" and "acts of God," see *McArthur v. Sears*, 21 Wend. 190, 198; *Dibble v. Morgan*, 1 Woods, 407.

<sup>2</sup> *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695.

<sup>3</sup> Gould, J., in *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235.

<sup>4</sup> *The Gold Hunter*, 2 Blatchf. & H. 300; *King v. Shepherd*, 3 Story, 349; *Pickering v. Burkley*, Style, 132, 2 Rolle, Abr. 248.

<sup>5</sup> *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627.

<sup>6</sup> *Hays v. Kennedy*, *supra*; *The Garston Co. v. Hickie*, L. R. 18 Q. B. Div. 17; *The Xantho*, L. R. 12 App. Cas. 503; *Buller v. Fisher*, 3 Esp. 67.

when there is no negligence on the part of the master or crew. Latterly, the courts have shown an indisposition to extend the comprehension of these words. The destruction of a vessel by worms at sea, is not accounted a loss by the "perils of the sea," nor was a damage by bilging arising in consequence of the insufficiency of the tackle for getting her from the dock;—nor was damage arising to the vessel by her props being carried away by the tide, while she was undergoing repairs on the beach, excused, as falling under that exception.<sup>1</sup> "Dangers of the river" only excepted among natural accidents, extend to river navigation.<sup>2</sup> "Perils of the sea" include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from some overwhelming power which could not be guarded against by the ordinary exercise of human skill and prudence.<sup>3</sup> By "dangers of navigation," or "unavoidable dangers of navigation," in a bill of lading, are meant latent dangers, and not such as are or ought to be patent dangers which could be avoided by skill and foresight.<sup>4</sup> The exception, in a bill of lading, of "dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind," covers only such losses as are of an extraordinary nature, or arise from some irresistible force which cannot be guarded against by the ordinary exertion of human skill and prudence.<sup>5</sup> An exception, in the bill of lading, of perils of the sea or other specific perils, does not exempt the carrier from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed.<sup>6</sup> After all proper effort to save life has been made, the safety of the cargo is the master's or carrier's duty.<sup>7</sup> The exception in-

<sup>1</sup> *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 312, 15 L. ed. 656.

<sup>2</sup> *Williams v. Branson*, 5 N. C. 417, 4 Am. Dec. 562.

<sup>3</sup> *The Reside*, 2 Sumn. 567; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197; *Hollingsworth v. Brodrick*, 7 Ad. & El. 40; *Waters v. Merchants Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691.

<sup>4</sup> *Costigan v. Michael Transp. Co.* 33 Mo. App. 269, 38 Mo. App. 219.

<sup>5</sup> *Richelieu & O. Nav. Co. v. Fortier*, 5 Mont. L. Rep. (Q. B.) 224.

<sup>6</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788.

<sup>7</sup> *Turner v. Protection Ins. Co.* 25 Me. 515, 43 Am. Dec. 294; *Sherman v. Inman SS. Co.* 26 Hun, 107; *The Portsmouth v. Onondaga Salt Co.* 76 U. S. 9 Wall. 682, 19 L. ed. 754.

cludes only the dangers or accidents of the sea or navigation properly so-called,—that is, one caused by the violence of the winds and waves, *a vis major*, acting upon a seaworthy and substantial ship,—and does not cover damages by rats, which is a kind of destruction not peculiar to the sea or navigation, but one to which such a commodity as cheese is equally liable in a warehouse on land as in a ship at sea.<sup>1</sup>

It may be stated generally, that the "dangers of navigation" include winds, lightning, shoals, rocks, collisions and waves—whether the natural motion of the water under tide, or storm, or caused by a passing vessel,—against which the skill of the navigator cannot guard.<sup>2</sup> Where a carrier, in order to land his cattle, places them after the customary manner, secured on a lighter, tying them in the usual manner,—and the cattle become frightened and break away, and some of them perish, such loss is covered by an exception in the bill of lading—"peril of the sea."<sup>3</sup>

An important decision has been rendered in the United States circuit court, March, 1894, by Judge Shipman touching the liabilities of a steamship company and common carriers generally for the baggage of passengers that may be damaged in transit through no fault of the passenger. The baggage of plaintiffs was stored in a forward compartment in the ship *Majestic*, and on the way over the glass in the portholes of that compartment was smashed and the salt water got in and damaged the baggage of the plaintiffs who were passengers. They recovered a judgment for \$2824 in the United States district court, and the case came before the circuit court on appeal by the *White Star Company*. The company claimed immunity, under the ordinary ticket contract, from liability to a greater amount than £10. Everybody who has ever ridden on railroad trains or steamships is more or less familiar with the conditions printed on the ticket under which the selling company disclaims liability, and it has been generally understood that these conditions were merely formal and would not hold, especially in a case where neglect on the part of

<sup>1</sup> *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 312, 15 L. ed. 656.

<sup>2</sup> *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285.

<sup>3</sup> *Anthony v. Aetna Ins. Co.* 1 Abb. (U. S.) 343.

the company was shown. The tickets on which the plaintiffs traveled were purchased in England by the father who is himself a frequent traveler. On the voyage to this country the *Majestic* passed through wreckage, and the probability was that the glass was smashed by some of this wreckage being dashed against it. The district court, in awarding damages, held that the fact that the steamship did not slow up while passing through this wreckage constituted an act of negligence. Judge Shipman reversed that opinion, and held that the meeting of the wreckage came under the "peril of the sea" clause of all carrying contracts. "It was an unanticipated peril of the sea," he said. "If such an injury could have been anticipated the speed of the ship should have been slackened, but it is apparent that the injury was of such an extraordinary character that the probability of taking such precautions to avoid it would not naturally have occurred to the mind."<sup>1</sup>

The carrier must furnish a seaworthy vessel, well equipped, and suitable for the purpose for which it is employed, and he is responsible for damages arising from failure to do so.<sup>2</sup> But the words "inevitable dangers of the sea," as affecting the liability of the carrier, may be varied by proofs of usage,<sup>3</sup> and it has been held that if there be no default in the carrier the loss occasioned by rats at sea comes within the perils of the sea.<sup>4</sup> But a vessel which did not take the usual and necessary precautions against damage by rats to a cargo known to be liable thereto, during a voyage of ordinary duration in which only the customary stops were made, is liable for extraordinary damage thereto, notwithstanding exceptions in the bill of lading as to vermin and negligence.<sup>5</sup> Indeed, damage to a cargo of cheese, occasioned by rats is not within the exception of the dangers or accidents of the sea

<sup>1</sup> *Potter v. The Majestic*, 23 L. R. A. 746, 60 Fed. Rep. 625.

<sup>2</sup> *Bell v. Reed*, 4 Binn. 127, 5 Am. Dec. 398; *Clark v. Richards*, 1 Conn. 54; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Kellogg v. La Crosse & M. Pucket Co.*, 3 Biss. 496; *The Northern Belle v. Robson*, 76 U. S. 9 Wall. 526, 19 L. ed. 748.

<sup>3</sup> *Adam v. Hay*, 7 N. C. 149.

<sup>4</sup> *Garrigues v. Cox*, 1 Binn. 592, 2 Am. Dec. 493.

<sup>5</sup> *The Timor*, 46 Fed. Rep. 859.

or navigation, within the usual acceptation of the terms.<sup>1</sup> If goods are gnawed by rats or cockroaches, carrier is liable, or if rats gnaw a hole in vessel causing it to leak.<sup>2</sup> A loss occasioned by worms is not a peril of the sea.<sup>3</sup> A stipulation in a bill of lading, exempting the shipowner from liability for damage or loss by vermin, or from any act, neglect, etc., of the officers or crew, will not relieve the shipowner from liability for injuries by rats, resulting from neglect to fumigate the ship before loading the cargo.<sup>4</sup> Cuts in drums of glycerine shipped, through which a portion of the glycerine escapes, in consequence of long continued heavy weather on the voyage, are sea perils for which the ship is not liable where the bill of lading excepts such perils.<sup>5</sup> Sweating of bags of sugar, is a peril of the sea.<sup>6</sup> Shipping water comes within this exemption as a "peril of the sea."<sup>7</sup> If goods are properly stowed, injury caused by the motion of the boat is also a "peril of the sea."<sup>8</sup> Damages to cotton thread put up in boxes caused by dampness without negligence or lack of proper precautionary measures on the part of the carrier, must be attributed to dangers of the sea.<sup>9</sup>

Where the contract of a bill of lading was that the goods should be delivered in good order, dangers of the sea excepted, sweating produced in consequence of negligence in stowage, is not one of the dangers of the sea. Leakage and diminution owing to existing but not apparent causes, are not within the risks guaranteed against by the bill of lading.<sup>10</sup> A fire, though accidental and without fault of the owners, is not within the exception of the dan-

<sup>1</sup> *Laveroni v. Drury*, 8 Exch. 166.

<sup>2</sup> *Aymar v. Astor*, 6 Cow. 266; *Kay v. Wheeler*, L. R. 2 C. P. 302; *Laveroni v. Drury*, 8 Exch. 166, 16 Eng. L. & Eq. 510; *Westray v. Miletus*, 2 Int. Rev. Rec. 61; *Dale v. Hall*, 1 Wils. 281; *Garrigues v. Cox*, 1 Binn. 592, 2 Am. Dec. 493; *Hunter v. Potts*, 4 Campb. 203.

<sup>3</sup> *Martin v. Salem Ins. Co.* 2 Mass. 421; *DePeyster v. Columbian Ins. Co.* 2 Cai. 85.

<sup>4</sup> *Sterens v. Navigazione Generale Italiana*, 39 Fed. Rep. 562.

<sup>5</sup> *The Trinacria*, 42 Fed. Rep. 863.

<sup>6</sup> *Mutthiessen & W. Sugar Ref. Co. v. Gusi*, 29 Fed. Rep. 794.

<sup>7</sup> *The Chasca*, 23 Fed. Rep. 156.

<sup>8</sup> *Christie v. The Craigton*, 41 Fed. Rep. 62.

<sup>9</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985.

<sup>10</sup> *Nelson v. Woodruff*, 66 U. S. 1 Black. 156, 17 L. ed. 97.

gers of the river in a bill of lading.<sup>1</sup> The explosion of a steam boiler is not a peril within the exception of dangers of navigation in the bill of lading.<sup>2</sup> Live stock injured solely through the effect of a storm will not render the carrier liable.<sup>3</sup> The breaking of a rope, either attaching the vessel to a dock, or a tiller rope, comes within the exemption of a "peril of the sea," or "unavoidable danger of navigation."<sup>4</sup> A collision caused by a tempest, is a loss by the "perils of the sea."<sup>5</sup> A carrier will not be answerable for goods thrown overboard to lighten the ship and boat, and preserve life where the necessity arises.<sup>6</sup> But if this is done as the result of negligence, without necessity, or imprudently or rashly, the master will be liable,<sup>7</sup> and he may so contract and not subject the ship to general average."

A ship is not liable for damage at sea to a cargo of tea stored in a watertight compartment, from water entering around a bolt holding a stanchion, which is not due to any original fault of construction, because of the bolt becoming worn upon the breaking of another bolt, and the bending of the stanchion in heavy weather, where those in charge of the ship are not negligent in not seasonably discovering the water and removing it from the hold.<sup>9</sup> The inflow of water through a leak occasioned by the working loose of a rivet in the foot of a bulwark stanchion is a peril of the sea and an accident of navigation, within the meaning of a charter party and bill of lading excepting those perils and accidents "even when occasioned by the negligence" of the master; and therefore the shipowner, under the English or New

<sup>1</sup> *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 312, 15 L. ed. 656.

<sup>2</sup> *Barrell v. The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406; *Caldrell v. New Jersey S. B. Co.* 56 Barb. 425.

<sup>3</sup> *Gabay v. Lloyd*, 3 Barn. & C. 793; *Lawrence v. Aberdeen*, 5 Barn. & Ald. 107.

<sup>4</sup> *Laurie v. Douglas*, 15 Mees. & W. 746; *The Morning Mail*, 17 Fed. Rep. 545.

<sup>5</sup> *The Bergensen*, 36 Fed. Rep. 700; *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58; *Gillett v. Ellis*, 11 Ill. 579.

<sup>6</sup> *Mouse's Case*, 12 Coke, 63; *Barcroft's Case*, cited in *Kenrig v. Eggleston*, Aleyn, 93; *Smith v. Wright*, 1 Cal. 43, 2 Am. Dec. 162.

<sup>7</sup> *The Bergen Seven*, 36 Fed. Rep. 700; *Bird v. Astcock*, 2 Bulst. 280; *Barcroft's Case*, *supra*; *Gillett v. Ellis*, 11 Ill. 579, 2 Hurlst. Abr. 517, 520, 531.

<sup>8</sup> *The Enríque*, 5 Hughes, 275.

<sup>9</sup> *The Exe*, 57 Fed. Rep. 399.

York and perhaps West Virginia rule, is not liable for damage caused by the leakage or the master's negligent failure to stop it.<sup>1</sup> A loss occasioned by the sudden change of wind, there being no lack of prudent care, will excuse the carrier as a loss by the act of God.<sup>2</sup> The result of storms and tempests in causing a ship to spring a leak or to ship a sea resulting in damage to the cargo, comes within the phrase "perils of the sea."<sup>3</sup> A stipulation in a bill of lading given by a steamship company, for its exemption from liability for damage occasioned by "blowing," as well as by other "perils of the seas," is binding upon a consignee receiving it.<sup>4</sup> If a vessel is obliged to use extraordinary press of sail in a gale of wind in following her tow, the injury to her cargo may be said to be caused by one of the perils of the sea.<sup>5</sup> So the stranding of a vessel comes within this exception.<sup>6</sup> Where a vessel was negligently run ashore, and, a storm coming on, was voluntarily scuttled to save her from total loss, and other general average expenses were subsequently incurred, the stranding, and not the storm, was the proximate cause of the loss; and the loss was within an exception in an insurance policy against want of ordinary care.<sup>7</sup> The clause in a bill of lading, that the carrier shall not be responsible for loss or damage by the perils of the sea, arising from the negligence of the master and crew of the ship, do not relieve him from such responsibility, except in New York or in English courts.<sup>8</sup> If the master be not guilty of want of prudence or skill he will not be answerable for the loss of his ship from striking on a hidden rock, the existence of which was not generally known.<sup>9</sup> An obstruction which has suddenly appeared in navigable waters comes within the exception of the "dangers of

<sup>1</sup> *The Oressington* [1891] Prob. 152.

<sup>2</sup> *Colt v. McMecken*, 6 Johns. 160, 5 Am. Dec. 200.

<sup>3</sup> 1 Bell, Com. 560, § 501.

<sup>4</sup> *East Tennessee, V. & G. R. Co. v. Wright*, 76 Ga. 532.

<sup>5</sup> *Hagedorn v. Whitmore*, 1 Stark. 157.

<sup>6</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. ("The Montana")* 129 U. S. 397, 32 L. ed. 788.

<sup>7</sup> *The Ontario*, 37 Fed. Rep. 220.

<sup>8</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co. ("The Montana")* *supra*.

<sup>9</sup> *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235.



navigation."<sup>1</sup> And if, without fault, a ship should be run aground and wrecked, this provision in the bill of lading, will protect the carrier.<sup>2</sup> When the contract in a bill of lading, that the goods are to be delivered at New Orleans without delay, contains an exception of the dangers of navigation and unavoidable accidents, and the goods are lost by the vessel striking an unseen obstruction and sinking, the loss occurs through a danger of navigation, if the navigation is in its course according to the usage of the trade.<sup>3</sup>

The term "dangers of lake navigation," in a bill of lading, include perils from shallowness of water at the entrance to a harbor; but where the danger might have been avoided by proper care and skill, the loss should be attributed to the negligence of the carrier, notwithstanding the exception in the bill of lading.<sup>4</sup> A loss from a mistake of port and attempting to enter at night instead of remaining on the lake till morning, is the result of the fault of the carrier and not a danger of lake navigation.<sup>5</sup> If a ship properly moored in a harbor strikes hard on the bottom from the swell or reflux of the tide, and her knees are injured, and the cargo damaged, the loss comes within the expected "perils of the sea."<sup>6</sup> The sinking of a steamer at the entrance of a canal, on a calm, clear night, is not included in an exception of dangers and accidents of the seas, etc.<sup>7</sup> A loss occasioned by pirates, falls within "perils of the sea."<sup>8</sup> All vessels employed in transporting goods from port to port, are carriers and, as such, liable for the safe custody, due transport and right delivery of the goods. Nothing can discharge them from the undertaking specified in the bill of lading but the unanticipated perils of the sea or the act

<sup>1</sup> *Redpath v. Vaughan*, 52 Barb. 489; *Gordon v. Buchanan*, 5 Yerg. 71; *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602.

<sup>2</sup> *The Juniata Paton*, 1 Biss. 15.

<sup>3</sup> *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568.

<sup>4</sup> *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 24 L. ed. 160.

<sup>5</sup> *The Portsmouth v. Onondaga Salt Co.* 76 U. S. 9 Wall. 682, 19 L. ed. 754.

<sup>6</sup> *Fletcher v. Inglis*, 2 Barn. & Ald. 315; *Kingsford v. Marshall*, 8 Bing. 458; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197.

<sup>7</sup> *Richelieu & O. Nav. Co. v. Fortier*, 5 Mont. L. Rep. (Q. B.) 224.

<sup>8</sup> 3 Kent, Com. 216; *Gage v. Tirrell*, 9 Allen, 299, 310; *Pickering v. Barkley*, 2 Rolle, Abr. 248, Style, 132; *Barton v. Walliford*, Comb. 56.

of God or the public enemy.<sup>1</sup> Under a contract to deliver a cargo safely, the perils of the sea only excepted, nothing will excuse the carrier for a non-performance except he has been prevented by some one of those perils, the act of libelants or the law of the country. They are responsible for the miscarriage of their master or agent.<sup>2</sup>

§ 44. *When "Act of God" or other Inevitable Cause no Excuse.* See also § 73.

The fact that the loss was caused by some "*vis major*," as by a flood, is sufficient, without affirmative proof that the carrier was not guilty of negligence, and this may be shown under a general denial.<sup>3</sup> It is not essential to the exemption of a carrier from liability for the loss of or injury to goods during their transportation, that the damages result solely from any one of the exceptional causes, such as the act of God or a public enemy, or the sole fault of the owner, it not being liable if two or all of such causes combine to produce the injury, if the carrier itself is without fault.<sup>4</sup> On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed "act of God," that it necessarily follows that the carrier is entitled to immunity;<sup>5</sup> the rain which fertilizes the earth and the wind which enables the ship to navigate the ocean, are as much within the term "act of God" as the rainfall which causes the river to burst its banks and carry destruction over the whole district, or the cyclone, which drives a ship against a rock and sends it to the bottom. Yet the carrier, who, by the rule, is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. The exception of perils of the sea does not exonerate

<sup>1</sup> *La Tourette v. Burton*, 68 U. S. 1 Wall. 43, 17 L. ed. 609; *Germania Ins. Co. v. The Lady Pike*, 88 U. S. 21 Wall. 1, 22 L. ed. 499.

<sup>2</sup> *Howland v. Greenway*, 63 U. S. 22 How. 491, 16 L. ed. 391.

<sup>3</sup> *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 349; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

<sup>4</sup> *McCarthy v. Louisville & N. R. Co.* (Ala.) 14 So. 370.

<sup>5</sup> *Strouss v. Wabash, St. L. & P. R. Co.* 17 Fed. Rep. 209.

the shipowner from liability for loss or damage from one of those perils, to which his negligence or that of his servants contributed.<sup>1</sup> For another principle may be involved. The carrier is bound to do his utmost to protect the goods committed to his charge, from loss or damage, and if he fails herein, he becomes liable, from the nature of his contract. In the one case, he can protect the goods by proper care, in the other, it is beyond his power to do so. If, by his default in omitting to take the necessary care, loss or damage ensues, he remains responsible, though the so-called "act of God" may have been the immediate cause of the mischief.<sup>2</sup>

The fact that a carrier is not liable for damage to goods caused by a flood, will not exempt it from liability for negligence in failing to dry them, especially where it had refused to surrender them to the owner on his demand.<sup>3</sup> And a common carrier is entitled to reimbursement in case that flood, storms, or the like, require immediate expense for the preservation of his cargo.<sup>4</sup> Failure to examine the cargo under the after hatches of a vessel, after notice of the damage to the cargo under the forward hatches by collision, is negligence attributable to the carriers, which will render them liable for such subsequent damages, as proceed from the lack of examination and reconditioning of the cargo under the after hatches, which had in fact been damaged by such collision.<sup>5</sup> A railway company is liable for the destruction of so much of a carload of wheat as it could have saved by ordinary care and diligence, where, although the car was partly submerged in water by a flood or freshet, a part of the wheat was above water and could have been saved if removed before it became damp.<sup>6</sup> Under the Georgia statute, a carrier is bound to exercise extraordinary diligence in protecting from damage by flood, while they are in his cars or warehouse, goods which arrive too late to

<sup>1</sup> *Bradley Fertilizer Co. v. The Edwin I. Morrison*, 153 U. S. 199, 38 L. ed. 688.

<sup>2</sup> *Gleson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458.

<sup>3</sup> *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106.

<sup>4</sup> *The Gratitude*, 3 C. Rob. Adm. 255, 258.

<sup>5</sup> *The Guildhall*, 58 Fed. Rep. 796.

<sup>6</sup> *Baltimore & O. R. Co. v. Keady*, 75 Md. 320, 49 Am. & Eng. R. Cas. 124.

give the usual notice to the consignee before the flood occurs, but is excused if they were damaged in spite of such diligence.<sup>1</sup>

A carrier is negligent if he fails to take precaution against such rise of high water, as is usual and ordinary, and reasonably to be expected at certain seasons of the year,<sup>2</sup> or if he attempt to cross a stream or river when a rise is to be expected immediately.<sup>3</sup> So, while the sudden failure of the wind is an "act of God," there is a degree of negligence imputable to the master in sailing so near the shore, under a light variable wind, that a failure in coming about would cast him aground. And, in the same way, the master may incur liability by bringing his ship under the influence of the tide.<sup>4</sup> Or in putting to sea in the face of a plainly impending storm, or any act which plainly incurs a needless peril from the elements.<sup>5</sup> Common carriers are only to be excused from losses happening in spite of all human effort and sagacity.<sup>6</sup> No one is responsible for the act of God, or "inevitable accident," except where human agency is combined with it, and neglect occurs in the employment of such agency.<sup>7</sup> Where the master of a wrecked vessel abandons her to the underwriters without the exercise of due diligence to save the cargo, the fact that the underwriters take possession, and sell a part of the cargo which is not insured, does not exempt the carrier from liability to the shipper for his loss.<sup>8</sup> The liability of a vessel for the sale by the master of cargo at a port of refuge, is to be determined by the law of the flag carried by the vessel. Under German law, a vessel is not liable for cargo sold at a port of refuge by the master in the honest belief that it is in the best interests of the owners, after taking

<sup>1</sup> *Richmond & D. R. Co. v. White*, 88 Ga. 805.

<sup>2</sup> *Ewart v. Street*, 2 Bail. L. 157, 23 Am. Dec. 131; *Moffat v. Strong*, 10 Johns. 12; *New Brunswick, S. B. & C. Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Great Western R. Co. v. Braith*, Moore, P. C. N. S. 101.

<sup>3</sup> *Campbell v. Morse*, 1 Harp. L. 468.

<sup>4</sup> *Charleston & C. S. B. Co. v. Bason*, 1 Harp. L. 262.

<sup>5</sup> *Wolf v. American Exp. Co.* 43 Mo. 423, 97 Am. Dec. 406.

<sup>6</sup> *Kent, Ch. J.*, in *Colt v. McMechen*, 6 Johns. 160, 5 Am. Dec. 200; *Amies v. Stevens*, 1 Strange, 123.

<sup>7</sup> *Chidester v. Consolidated Ditch Co.* 59 Cal. 202.

<sup>8</sup> *Bixby v. Dumar*, 54 Fed. Rep. 718.

the best advice he can get on the spot.<sup>1</sup> Where a casualty occurs which might have been prevented by the use of known and proper precautions against the danger, it is not inevitable accident.<sup>2</sup> A carrier of goods is bound to use extraordinary diligence, both to avoid needlessly exposing the goods to injury or destruction by an unforeseen act of God, and to use measures for their protection and preservation after the peril has become apparent, under Ga. Code, § 2066.<sup>3</sup> An exception, in the bill of lading, of perils of the sea or other specified perils, does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself, or his servants, has contributed.<sup>4</sup>

If the ship is unseaworthy, and hence perishes from the storm, which it otherwise would have weathered,—if the carrier, by undue deviation or delay exposes himself to the danger which he otherwise would have avoided or if, by his rashness, he unnecessarily encounters it—as by putting to sea in a raging storm,—the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is required of him, to protect him from liability in respect of loss arising from the "act of God;" and if he uses all the known means which prudent and experienced carriers ordinarily have recourse to, he does all that can be reasonably required of him, and if, under such circumstances, he is overpowered by a storm or other natural agencies, he is within the rule that gives immunity from such *vis major*, as the "act of God."<sup>5</sup> If, while the carrier is in

<sup>1</sup> *The August* [1891] Prob. 328.

<sup>2</sup> *Ladd v. Foster*, 31 Fed. Rep. 827.

<sup>3</sup> *Richmond & D. R. Co. v. White*, 88 Ga. 805.

<sup>4</sup> *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 19 L. ed. 457; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Grill v. General Iron Screw Colliery Co.* L. R. 1 C. P. 600, L. R. 3 C. P. 476; *The Xantho*, L. R. 12 App. Cas. 503, 510, 515.

<sup>5</sup> *Nugent v. Smith*, L. R. 1 C. P. Div. 423; *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197; *Gillespie v. St. Louis, K. C. & N. R. Co.* 6 Mo. App. 554; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Nashville & C. R. Co. v. David*, 6

fault in departing from its contract and line of duty, goods are injured in consequence of that fault by an "act of God,"—which would not otherwise have produced the injury—the carrier is answerable.<sup>1</sup> When failure of the carrier without excuse to start the goods at a time when they would have escaped peril from inevitable accident, will prevent his availing himself of the plea that the injury or loss was caused by the "act of God," is a question upon which the decisions have not been uniform. In many cases this delay is considered so remote as to preclude the carrier from availing himself of the exception.<sup>2</sup> If the "act of God" be the proximate cause, the carrier will not be liable for the loss, although its own negligence may have contributed—as a remote cause.<sup>3</sup> Where the negligence of the defendant concurs in and contributes to the injury, he is not exempt from liability because the immediate damage seems to result from the act of God, or inevitable accident.<sup>4</sup> But, this concurring negligence of the carrier must be such as is in itself a real producing cause of the injury, and not a mere fanciful or speculative negligence, which may not, in fact, in the least degree, have caused the injury.<sup>5</sup> Though undoubtedly the act of God which will excuse the carrier must be the proximate, and not the remote, cause of the loss.<sup>6</sup>

But other courts have held an inexcusable delay sufficient to pre-

Heisk. 261, 19 Am. Rep. 594; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Sweetland v. Boston & A. R. Corp.* 102 Mass. 276; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

<sup>1</sup> *Michaels v. New York Cent. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415.

<sup>2</sup> *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Hoadley v. Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Michigan Cent. R. Co. v. Burrocks*, 33 Mich. 6; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645.

<sup>3</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

<sup>4</sup> *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

<sup>5</sup> *Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist.* 96 Pa. 65, 42 Am. Rep. 529.

<sup>6</sup> *King v. Shepherd*, 3 Story, 356; *Schiffelin v. Harvey*, 6 Johns. 169, 5 Am. Dec. 206; *Elliott v. Rossell*, 10 Johns. 1, 6 Am. Dec. 306; *Merritt v. Earle*, 29 N. Y. 117, 86 Am. Dec. 292; *Michaels v. New York Cent. R. Co.* 30 N. Y. 571, 86 Am. Dec. 415; *Hart v. Allen*, 2 Watts, 114; *Ewart v. Street*, 2 Bail. L. 157, 23 Am. Dec. 131; *Campbell v. Morse*, 1 Harp. L. 468; *Siordet v. Hull*, 4 Bing. 607; *Desty, Commerce & Navigation*, § 250.

clude the carrier from availing himself from what would otherwise be a sufficient defense.<sup>1</sup> Thus it is said the act of God must not only be the proximate, but the sole, cause of the loss, for, if mingled with a negligent delay of the carrier, he is still responsible.<sup>2</sup>

Where human agency intervenes, the act of God cannot be effective as a defense; as, where a steamer was sunk by running upon the mast of a sloop capsized a day or two previously, the squall which sunk the sloop was too remote.<sup>3</sup> So, where a vessel was stranded by being driven against a concealed bar, the light of a stranded vessel misleading the pilot.<sup>4</sup> Any act or omission on the part of the carrier contributing to the loss, takes away the protection of the defense that the loss was occasioned by the act of God.<sup>5</sup> Under same authorities, a snag swept into the usual channel of the river, is an obstruction placed there by the act of God.<sup>6</sup> So is an obstruction unknown to navigators in open waters—as a sunken rock.<sup>7</sup>

Recent authorities are not inclined to excuse the carrier, where human skill could avoid the result which may arise from a sudden storm. Thus, a railroad company is bound to prevent a land slide in a cut made by it, which ordinary skill would enable engineers to foresee, and is liable for accidents occurring therefrom.

<sup>1</sup> *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Southern Exp. Co. v. Womack*, 1 Heisk. 256; *Michigan Cent. R. Co. v. Curtis*, 80 Ill. 324.

<sup>2</sup> *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 340; *Dunsbach v. Hollister*, 49 Hun, 352; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6. See notes to *Hull v. Chicago, St. P. M. & O. R. Co.* (Minn.) 5 L. R. A. 587; *Insurance Co. of North America v. Easton* (Tex.) 3 L. R. A. 424; *Hartwell v. Northern Pac. Exp. Co.* (Dak.) 3 L. R. A. 342; *Fox v. Boston & M. R. Co.* (Mass.) 1 L. R. A. 702.

<sup>3</sup> *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, 31 Barb. 38.

<sup>4</sup> *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127; *Mershon v. Hobensack*, 22 N. J. L. 372; *Buckhouse v. Sneed*, 5 N. C. 173; *McArthur v. Sears*, 21 Wend. 190.

<sup>5</sup> *Dibble v. Morgan*, 1 Woods, 412; *The Zenobia*, 1 Abb. Adm. 80, 95. As to careless stowage, see §§ 73 to 77.

<sup>6</sup> *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Smyre v. Niolon*, 2 Bail. L. 421, 23 Am. Dec. 146; *Faulkner v. Wright*, Rice, L. 107.

<sup>7</sup> *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568. But, see, *Friend v. Woods*, 6 Gratt. 189, 52 Am. Dec. 119; *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 237; *Trent & M. Nav. Co. v. Wood*, 3 Esp. 127.

The fact that the slide was produced by the loosening of the earth by the rain, where there is no proof that the rain was of an extraordinary character, or that extraordinary results followed it, but that it was a common natural event, such as not only might have been foreseen as probable, but also must have been foreknown as certain to come, is not embraced by the technical phrase, "act of God."<sup>1</sup> If injury is occasioned by inevitable accident, no action will lie for it, but if any blame is imputable to the defendant, though he had no intention to injure the plaintiff or any other person, he is liable for the injury suffered.<sup>2</sup> But in an action for the loss of goods shipped, where the defense is "an act of God," the burden of showing that the negligence of the carrier co-operated, is on the shipper, and this may be shown under a general denial.<sup>3</sup>

### § 45. "Fire Clause."

Fire, unless produced by lightning, does not come within the common law exception to a carrier's liability.<sup>4</sup> But it may come within the terms of a statute exempting the carrier from loss caused by "accidents."<sup>5</sup> But, unless there be an exception of "fire," the explosion of a boiler, nor collision, not caused by peril excepted, nor the wreck of the vessel by unknown obstruction, or shifting of a buoy, nor the explosion of part of the cargo, causing the fire, will not relieve the carrier though he be not guilty of

<sup>1</sup> *Gleeson v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 458.

<sup>2</sup> *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Percival v. Hickey*, 18 Johns. 289, 9 Am. Dec. 210; *Bullock v. Babcock*, 3 Wend. 391; *The Mollie Mohler*, 2 Biss. 508; *The New Jersey*, Olcott, 448; *The Lady Pike*, 2 Biss. 145; *Amies v. Stevens*, 1 Strange, 128; *Weaver v. Ward*, Hob. 134; *Leame v. Bray*, 3 East, 593.

<sup>3</sup> *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 349.

<sup>4</sup> *Forward v. Pittard*, 1 T. R. 33; *American Transp. Co. v. Moore*, 5 Mich. 368; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Mershon v. Hobensack*, 22 N. J. L. 372; *Hibler v. McCartney*, 31 Ala. 502; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Chevallier v. Straham*, 2 Tex. 115, 47 Am. Dec. 639; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038; *Hall v. Cheney*, 36 N. H. 26; *Sluyter v. Hayward Rubber Co.* 26 Conn. 128; *Cox v. Peterson*, 30 Ala. 608, 68 Am. Dec. 145; *Parker v. Flagg*, 26 Me. 181, 45 Am. Dec. 101; *Moore v. Michigan Cent. R. Co.* 3 Mich. 23; *Miller v. Steam Nav. Co.* 10 N. Y. 431.

<sup>5</sup> *Hunt v. Morris*, 6 Mart. (La.) 676, 12 Am. Dec. 489.



negligence.<sup>1</sup> A contract exempting the carrier from liability for a loss by fire not due to negligence, and based upon a sufficient consideration, the shipper having the right to elect between a liability with or without the fire clause, is valid.<sup>2</sup> The authorities are practically unanimous concerning a loss by fire under a bill of lading containing a fire clause, and they establish the relation of bailor and bailee. An action cannot be brought on the implied agreement of the common law for the loss by fire, without the carrier's negligence, of goods shipped under a bill of lading by which the carrier is freed from liability for loss by fire.<sup>3</sup> Contracts when based upon a sufficient consideration, have been held to be valid, and to protect the company from liability for loss by fire, caused otherwise than by the negligence of the company or its agents.<sup>4</sup> In the case last cited the court said: "A lower rate of freight, or something equivalent, will be a sufficient consideration for the stipulation."<sup>5</sup> Fire, unless caused by the negligence of the carrier, is one of the things against which the carrier may by contract exonerate himself from responsibility.<sup>6</sup>

Where, however, an excepted occurrence causes the fire, this will be taken to be the proximate cause, and the fire but an incident,—and the carrier will be excused.<sup>7</sup> A furious wind which blows a car from the track is the proximate cause of the loss of

<sup>1</sup> *Bulkley v. Naumkeag Steam Cotton Co.* 65 U. S. 24 How. 386, 16 L. ed. 599; *Plaisted v. Boston & K. S. Nav. Co.* 27 Me. 132; *Houston & G. Nav. Co. v. Dwyer*, 29 Tex. 376; *Brousseau v. The Hudson*, 11 La. Ann. 427; *Reaves v. Waterman*, 2 Spears, L. 197; *Agnew v. The Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87; *Friend v. Woods*, 6 Gratt. 189, 52 Am. Dec. 119; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *New Brunswick S. B. & C. Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394.

<sup>2</sup> *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

<sup>3</sup> *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326; *Memphis & C. R. Co. v. Reeves*, 17 U. S. 10 Wall. 176, 49 L. ed. 909; *Clark v. Burnicell*, 53 U. S. 12 How. 274, 13 L. ed. 985; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Wheeler*, Carr. 254, 255.

<sup>4</sup> *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288.

<sup>5</sup> *Dillard v. Louisville & N. R. Co. supra*.

<sup>6</sup> *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 104, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 376, 377, 21 L. ed. 639.

<sup>7</sup> *Pennsylvania R. Co. v. Fries*, 87 Pa. 234.

goods contained therein which are destroyed by fire which immediately follows, without negligence on the part of the carrier, as the result of the overturning of the car, in which were burning a lamp and a coal fire.<sup>1</sup> Principle establishes a liability against the carrier for a loss by fire, arising from other than a natural cause, whether occurring on the steamboat accidentally, or communicated from another vessel or from the shore;—and the fact that fire produces the motive power of a ship, does not affect the case.<sup>2</sup> "The dangers incident to railroad transportation, fire and all other unavoidable accidents excepted," are effective as a limitation on the common law liability of the carrier for loss by fire.<sup>3</sup> A notice by carrier by rail—unprovided with means for arresting sparks—that it would transport cotton at half rate, if relieved from risk as to fire, is sufficient to relieve it from liability on bringing proof of destruction by fire while being transported.<sup>4</sup> But where in a bill of lading given by a carrier by water, he contracts to deliver the goods over a land route, "the damages of navigation, fire or collision on the lakes, rivers and canals excepted," such carrier will not be discharged for a loss occurring through fire on a railroad.<sup>5</sup> A bill of lading providing that the carrier shall not be liable for any loss or damage from fire, wetting, combustion, or heating, unless affirmatively caused by its negligence, does not exempt the carrier from liability to general average upon destruction of the cargo by wetting to extinguish a fire therein,—especially where the stipulations are printed in very small type.<sup>6</sup>

It is now well settled that the common law liability of carriers

<sup>1</sup> *Blythe v. Denver & R. G. R. Co.* 11 L. R. A. 615, 15 Colo. 333.

<sup>2</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 381, 12 L. ed. 465, 481; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539, 39 Am. Dec. 398; *Singleton v. Hilliard*, 1 Strobb. L. 203; *Gilmore v. Carman*, 1 Smedes & M. 279, 40 Am. Dec. 96; *Garrison v. Memphis Ins. Co.* 60 U. S. 19 How. 312, 15 L. ed. 656.

<sup>3</sup> *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424.

<sup>4</sup> *Smith v. North Carolina R. Co.* 64 N. C. 235. See also, *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.* 20 La. Ann. 302; *Levy v. Pontchartrain R. Co.* 23 La. Ann. 477.

<sup>5</sup> *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

<sup>6</sup> *The Roanoke*, 53 Fed. Rep. 270.

may be limited by special contract, even to the extent of denuding them of the character of insurers, except as against their own negligence, and the limitation may be embraced in the bill of lading. To be valid, it must be fairly obtained, and just and reasonable. Under the English Railway and Canal Traffic Act of 1854, such stipulations are called “conditions” and are upheld only when they are . . . just and reasonable. The same criterion is uniformly applied in this country, and no limitations of the carrier’s common law liability will afford protection, unless “just and reasonable” in the eyes of the law.<sup>1</sup> The burden of proving the reasonableness of a condition lies upon the company. The most cogent evidence in favor of reasonableness is to show that the condition was not forced upon the customer, but that he had a fair alternative of getting rid of the condition, and yet agreed to it.<sup>2</sup> It has been held that a “fire clause” in a bill of lading exempting the carrier from liability from loss by fire, is not valid where transportation under the rules of the common law is not offered as an alternative, and no reduction of rates is made as a consideration for the exemption.<sup>3</sup> A carrier cannot by special contract limit its common law liability for losses not occasioned by negligence, where it does not afford the shipper an opportunity to contract for the service required without such restriction, even, it is said, if he makes the special contract without objection or demand for a different one.<sup>4</sup> After the delivery of goods to the carrier, the sending of the receipt to the shipper—containing a clause exempting the carrier from liability from loss by fire—where such exemption is not brought to the notice of the shipper until after the property is destroyed, will not discharge the carrier from liability.<sup>5</sup>

<sup>1</sup> *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hart v. Pennsylvania R. Co.* 112 U. S. 338, 28 L. ed. 720; *Marr v. Western U. Teleg. Co.* 85 Tenn. 542.

<sup>2</sup> *Redman, Carr.* (2d ed.) 66, citing *Lewis v. Great Western R. Co.* 47 L. J. Q. B. N. S. 131.

<sup>3</sup> *Louisville & N. R. Co. v. Gilbert*, 7 L. R. A. 162, 88 Tenn. 430.

<sup>4</sup> *Little Rock & Ft. S. R. Co. v. Cravens*, 18 L. R. A. 527, 57 Ark. 112.

<sup>5</sup> *Lamb v. Camden & A. R. Co.* 4 Daly, 483.

### § 46. *Statutory Provisions Regarding "Fire Clause."*

Unless the carrier complies with the requirements of the Act of Congress, and provides, not only a seaworthy vessel but proper appliances for the extinguishment of fire, he cannot claim the benefit of the exceptions in his bill of lading.<sup>1</sup> The Act of Congress of March 3, 1851, relieves the ship owner from liability for loss to goods on board by fire, to which he has not contributed, either by his own design or negligence.<sup>2</sup> An accidental fire on a vessel, not owned or chartered by the carrier who uses it as part of its line, which injures the goods shipped, will not relieve the carrier from liability by the New York Statute of 1851, chapter 43.<sup>3</sup> A provision in a bill of lading of goods to be shipped from Texas to Massachusetts, that the carrier shall not be liable for loss by fire, is valid notwithstanding a Texas statute making a stipulation of that character void, as that statute does not apply to interstate or foreign shipments.<sup>4</sup>

### § 47. *Goods in Transit or Depot—"Fire Clause."*

Where the exemption was from loss by fire, and the goods were unloaded in transit, awaiting reshipment, and were lost by fire, the carrier is held liable,<sup>5</sup> though he be guilty of no neglect, but not when it is caused by lightning.<sup>6</sup> The ordinary carrier bill of lading exempting the carrier for loss by fire on cotton, does not exempt the carrier from loss by fire while the cotton is in the possession of a compress company to which it has been delivered as the agent of the carrier, instead of at the carrier's own

<sup>1</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465.

<sup>2</sup> *Walker v. Western Transp. Co.* 70 U. S. 3 Wall. 150, 18 L. ed. 172.

<sup>3</sup> *Hill Mfg. Co. v. Boston & L. R. Corp.* 104 Mass. 123, 6 Am. Rep. 202.

<sup>4</sup> *Otis Co. v. Missouri Pac. R. Co.* 113 Mo. 622.

<sup>5</sup> *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470.

<sup>6</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 425, 12 L. ed. 500; *King v. Shepherd*, 3 Story, 349; *Elliott v. Russell*, 10 Johns. 1, 6 Am. Dec. 306; *Putapsco Ins. Co. v. Coulter*, 28 U. S. 3 Pet. 222, 7 L. ed. 659; *Toulmin v. Anderson*, 1 Taunt. 227, 385; *McArthur v. Sears*, 21 Wend. 190; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389.

depot.<sup>1</sup> A provision in the bill of lading exempting the railroad company from loss or damage "by fire or other casualty, while in transit, or in depots or places of transshipment," to goods shipped, will be sustained.<sup>2</sup> A contract that the carrier "shall not be liable for loss or damage . . . by fire, or other casualty while in transit, or while in depots or landings at point of delivery," will relieve the carrier from responsibility for goods destroyed by the burning of the depot at which they were received for shipment, where ordinary care has been used.<sup>3</sup> Goods awaiting transshipment in a railroad depot are within the clause of a bill of lading exempting the carrier from liability for loss by fire from any cause, on land or water, or while awaiting transshipment at any port.<sup>4</sup>

A railroad company is not liable for the loss by fire, not due to its negligence, of cotton transported by it and delivered on a switch, under an arrangement by which the consignee has the right to open the cars, and it is no longer to guard the property, where the waybill has been delivered up to it, although the property still remains in its car.<sup>5</sup> A bill of lading issued for cotton shipped, reserving to the carrier the privilege, at its own expense, of compressing the cotton for convenience of carriage, and exempting the carrier from liability for loss or damage by fire while at the depots, stations, warehouses, or in transit, exempts the company from loss by fire without negligence while the cotton is warehoused for compression, although the warehouseman is agent of the company.<sup>6</sup> The burning of cotton while awaiting compression as provided by a bill of lading, in a compress not owned or operated by the carrier, is within a clause in the bill exempting the carrier from loss by fire while the property is on deposit in place of transshipment or depots or landings or at points of delivery.<sup>7</sup>

<sup>1</sup> *Deming v. Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306.

<sup>2</sup> *Louisville & N. R. Co. v. Oden*, 80 Ala. 38.

<sup>3</sup> *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590.

<sup>4</sup> *Brown v. Louisville & N. R. Co.* 36 Ill. App. 140.

<sup>5</sup> *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365.

<sup>6</sup> *Lancaster Mills v. Merchants Cotton Press & S. Co.* 89 Tenn. 1, 45 Am. & Eng. R. Cas. 423.

<sup>7</sup> *Missouri Pac. R. Co. v. Sherwood*, 17 L. R. A. 643, 84 Tex. 125.

A railway company will not be liable for goods destroyed on a steamboat connected with the railway at a wharf, where the goods are transferred from the boat to the cars, and the employes of the steamboat and the railway company are both engaged in the transfer, the boat itself, with the cars and goods and wharf, being destroyed during the process of transporting the goods in different loads.<sup>1</sup> After the goods are put into the sheds of the carrier, on its wharf, guarded by a watchman, a fire occurring from an unknown cause on the steamboat, while fully manned, lying at the wharf, which consumed the goods, will not render the carrier liable, unless there be proof of its negligence.<sup>2</sup> A receipt from the Pennsylvania Railroad Company for oil to be delivered “Leech, at the company’s freight station at Philadelphia,” with a memorandum appended to the receipt “Rate to Red Hook, 65 cts.,” also “this oil is carried only on open cars, and entirely at the owner’s risk from fire and leakage, whilst in the possession of the railroad company, or carriers, while standing or in transit,” the freight to be paid at Red Hook, contained only an engagement to forward to Red Hook as the ultimate destination, and the limitation, as to the liability, applied only to the carrier giving the receipt; and another railroad company having accepted the oil and given a receipt to “Leech, Agent of the Pennsylvania R. Co.,” for the oil to be transported to New York, and it having been destroyed by fire between Philadelphia and Red Hook, it became liable as a common carrier, there being no other contract with it than its receipt, which did not limit its liability.<sup>3</sup> A railroad company to which a quantity of apples is delivered as warehouseman was held as a common carrier, when a sufficient quantity to make a carload has been delivered, and a car has been asked for and promised by the company, so as to be responsible for their loss by fire after the car should have been furnished, although the shipping contract which the shipper would have been required to sign, provides that the company shall not be liable for damages occasioned by fire. This decision was affirmed on appeal, the court being equally divided.<sup>4</sup>

<sup>1</sup> *Gass v. New York, P. & B. R. Co.* 99 Mass. 220, 96 Am. Dec. 742.

<sup>2</sup> *Furnham v. Camden & A. R. Co.* 55 Pa. 53.

<sup>3</sup> *Camden & A. R. Co. v. Forsyth*, 61 Pa. 81.

<sup>4</sup> *Milloy v. Grand Trunk R. Co.* 23 Ont. Rep. 454, 55 Am. & Eng. R. Cas. 579.

# § 48. *Negligence Defeats "Fire Clause."*

A bill of lading stipulating that release "from damage or loss of any article from or by fire or explosion of any kind," simply releases the carrier's common law liability as an insurer, but does not release from a loss occurring through a fire or explosion caused by the carrier's negligence.<sup>1</sup> When a carrier contracts for exemption from liability for injury from fire he is bound to exercise ordinary diligence to prevent such injury.<sup>2</sup> The moment a faulty negligence begins, the carrier becomes an insurer against the consequences therefrom, both ordinary and extraordinary.<sup>3</sup> The presumption attends every fault connected with the management of a vessel, and every omission to comply with a statutory requirement, or with any regulation deemed essential to good seamanship, that such fault or omission contributed to the collision.<sup>4</sup> A stipulation in a contract of shipment, exempting the carrier from liability from loss by fire or other casualty while the goods are in transit or in depots or places for reception, does not exempt it from liability for such loss resulting from its own negligence or want of due care.<sup>5</sup> A railroad company which undertakes to

<sup>1</sup> *Steinweg v. Erie R. Co.* 43 N. Y. 123, 3 Am. Rep. 673; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Missouri Valley R. Co. v. Caldwell*, 8 Kan. 244; *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664; *Wallace v. Mattheys*, 39 Ga. 617, 99 Am. Dec. 473; *Thayer v. St. Louis, A. & T. H. R. Co.* 22 Ind. 26, 85 Am. Dec. 409; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Montgomery & W. P. R. Co. v. Edmonds*, 41 Ala. 667; *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Lamb v. Camden & A. R. & Transp. Co.* 2 Daly, 454; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526; *School District in Medfield v. Boston, H. & E. R. Co.* 102 Mass. 552, 3 Am. Rep. 502; *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.* 1 Disney, 480; *York Mfg. Co. v. Illinois R. Cent. Co.* 1 Biss. 377, 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Furnham v. Camden & A. R. Co.* 55 Pa. 53; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Mann v. Birchard*, 40 Vt. 326; *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88.

<sup>2</sup> *Little Rock, M. R. & T. R. Co. v. Tulbot*, 47 Ark. 97.

<sup>3</sup> *Davis v. Garrett*, 6 Bing. 716; *Bell v. Reed*, 4 Binn. 127, 5 Am. Dec. 398; *Hart v. Allen*, 2 Watts. 114; *Williams v. Grant*, 1 Conn. 492, 7 Am. Dec. 23; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 145.

<sup>4</sup> *The Martello v. Willey*, 153 U. S. 64, 38 L. ed. 637.

<sup>5</sup> *Louisville & N. R. Co. v. Touart*, 97 Ala. 514; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327.

transport a quantity of cotton, but reserves to itself the privilege of compressing it, by placing the cotton in the hands of a compress company constitutes such company its agent, and is liable for the destruction of the cotton by fire through its negligence.<sup>1</sup> A delay of six days in shipment, by reason of a disagreement between the carrier and a connecting line, is unreasonable; and the carrier will be liable for losses occurring by fire during such delay, notwithstanding an exception in its bill of lading.<sup>2</sup>

Where cotton is shipped in open flat cars, it is the duty of the carrier to take additional precaution for the protection and safety of the cotton, although its shipment in this manner may not be in itself such negligence as would make the carrier liable under all contingencies.<sup>3</sup> Still the carriage of cotton upon open cars has been held to be such a negligent act, as prevents the carrier from availing itself of a contract releasing its liability for a loss by fire.<sup>4</sup> But a steamer is not negligent so as to render it liable for the destruction of cotton by fire, in having it piled upon a landing a mile away from the nearest town, which is of but 250 population, and on a point with water on both sides within 1 or 2 feet, although it is stored in the open air and there is no watchman employed, in the absence of any reason to anticipate its destruction by fire.<sup>5</sup> The jury may properly find, as a question of fact, that the failure of a carrier to rescue goods from a car which had been overturned by the force of the wind, before they were consumed by fire, started by the stove fire and lights within the car, was not negligence, where the evidence shows that the wind was so strong as to render it almost impossible for men to stand or walk, while the air was so full of dust and flying material that scarcely anything could be seen, and the fire succeeded the overturning almost instantaneously, so that even the messengers within the car escaped with great difficulty.<sup>6</sup> Where goods were plainly

<sup>1</sup> *Otis Co. v. Missouri Pac. R. Co.* 112 Mo. 622.

<sup>2</sup> *Condict v. Grand Trunk R. Co.* 54 N. Y. 506.

<sup>3</sup> *Insurance Co. of North America v. St. Louis, I. M. & S. R. Co.* 3 McCrary, 233.

<sup>4</sup> *New Orleans, St. L. & C. R. Co. v. Fuler*, 58 Miss. 911.

<sup>5</sup> *The Guiding Star*, 53 Fed. Rep. 936.

<sup>6</sup> *Blythe v. Denver & R. G. R. Co.* 11 L. R. A. 615, 15 Colo. 333.



marked "J. Weil & Bro.," but were entered by the station agent on the waybill, as "T. Weil & Co.," and on the consignee calling for the goods, he was informed that they had not arrived, and the mistake was not discovered until the goods were destroyed, with the depot, by fire, the carrier was liable for the loss.<sup>1</sup>

Where a defect in the coupling prevented a car, containing merchandise shipped under an exception exempting the carrier from loss by fire, from being uncoupled, and the car and its contents was therefore consumed, the carrier was refused the benefit of the exemption on the ground of negligence in the defective coupling.<sup>2</sup> A railroad company is liable for cotton burned in its car while entrusted to it for shipment, where the cotton would not have been destroyed but for the breaking of a drawbar in attempting to draw the train out of danger, although its bill of lading contains a valid clause exempting it from liability for loss by fire.<sup>3</sup>

#### § 49. *Burden of Proof for Loss under Exceptions.*

The burden of proof is on the carrier to show that losses were occasioned by the "act of God" or the public enemy.<sup>4</sup> A carrier must bring the cause of the loss, by proof, within one of his exceptions, in order to secure immunity.<sup>5</sup> It is for the carrier to show any modification of the responsibility.<sup>6</sup>

Where the loss or injury to goods occurs, admittedly, through what is called an "act of God," and it is sought to hold the carrier liable for negligently bringing the goods within the peril of this casualty, affirmative proof must be introduced to sustain the

<sup>1</sup> *Meyer v. Chicago & N. W. R. Co.* 24 Wis. 566, 1 Am. Rep. 207. See also, *Stevens v. Boston & M. R. Co.*, 1 Gray, 277.

<sup>2</sup> *Empire Transp. Co. v. Wamsutta Oil R. & M. Co.* 63 Pa. 14, 3 Am. Rep. 515

<sup>3</sup> *Deming v. Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306.

<sup>4</sup> *Winne v. Illinois Cent. R. Co.* 31 Iowa, 583; *Bansemmer v. Toledo & W. R. Co.* 25 Ind. 434, 87 Am. Dec. 367.

<sup>5</sup> *Tygart Co. v. The Charles P. Sinnickson*, 24 Fed. Rep. 304; *The Charles J. Willard*, 38 Fed. Rep. 759.

<sup>6</sup> See also *Chamberlain v. Western Transp. Co.* 45 Barb. 218; *The Niagara v. Cordes*, 62 U. S. 21 How. 26, 16 L. ed. 47; *Elliott v. Rossell*, 10 Johns. 7, 6 Am. Dec. 306; *Richards v. London & S. C. R. Co.* 7 C. B. 839.

averment.<sup>1</sup> The preponderance of authority is in support of the rule that where it clearly appears that the loss is occasioned by an accepted peril, the one alleging negligence, either in negligently bringing the goods within the peril, or negligently omitting a care which would have preserved them, notwithstanding the casualty, must produce proof in support of his averment.<sup>2</sup> Where, by special contract, a carrier has limited its liability in certain cases, the burden of proof of negligence, where a loss occurs, is on the shipper.<sup>3</sup> Where a loss occurs which is within an exception of the bill of lading, it is the duty of the shipper, if he seeks a recovery, to show that the loss was the result of the carrier's negligence.<sup>4</sup>

Negligence is a positive wrong and will not be presumed, though it may be inferred from circumstances. When the carrier brings himself within the exception, there no longer exists any liability. Such liability can only be imposed by affirmative proof establishing negligence, which excludes the carrier from the benefit of the exception which has, *prima facie*, released him.<sup>5</sup> In the absence of proof of negligence, a carrier will not be responsible under a contract excusing it from loss by fire, excepting in case of

<sup>1</sup> *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Western R. Co. v. Harrell*, 91 Ala. 340; *Brown v. Adams Exp. Co.* 15 W. Va. 812; *Missouri Pac. R. Co. v. China Mfg. Co.* 79 Tex. 26; *Gaines v. Union Transp. & Ins. Co.* 28 Ohio St. 418; *Slater v. South Carolina R. Co.* 29 S. C. 96; *Berry v. Cooper*, 28 Ga. 543; *Shriver v. Sioux City & P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552; *Boies v. Hartford & N. H. R. Co.* 37 Conn. 272; *Dunseth v. Wade*, 3 Ill. 285, 2 Greenl. Ev. § 219. Examine, *The Martello v. Willey*, 153 U. S. 64, 38 L. ed. 637.

<sup>2</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Christie v. The Craigton*, 41 Fed. Rep. 62; *Ohrloff v. Briscall*, L. R. 1 P. C. 231.

<sup>3</sup> *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 629; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Patterson v. Clyde*, 67 Pa. 500; *Hubbard v. Harnden Exp. Co.* 10 R. I. 244; *Smith v. North Carolina R. Co.* 64 N. C. 235; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653.

<sup>4</sup> *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Mitchell v. United States Exp. Co.* 46 Iowa, 214; *Little Rock, M. R. & T. R. Co. v. Harper*, 44 Ark. 208; *Kelham v. The Kensington*, 24 La. Ann. 100; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Witting v. St. Louis & S. F. R. Co.* 28 Mo. App. 103, 10 L. R. A. 602, 101 Mo. 631.

<sup>5</sup> *Witting v. St. Louis & S. F. R. Co. supra*.

negligence, where the property is destroyed by fire through the act of a mob.<sup>1</sup> Where goods shipped under a bill of lading exempting the carrier from liability from loss by fire are burned in the car after delivery to the consignee, there can be no recovery from the carrier except upon proof of its negligence causing the fire.<sup>2</sup> But, where the carrier refuses to advise the shipper of the circumstances under which the loss occurs, it has been held that this refusal creates a presumption of negligence and wrong, and the fact that the loss occurred from an excepted cause, being shown on the trial, is not sufficient in itself to relieve the carrier from this presumption which his own conduct has created, of some act of negligence or omission on his part.<sup>3</sup> Still, it may be said generally, that where the evidence placed before the jury leaves in doubt whether the negligence of the carrier contributed to the injury, which, to some extent at least, resulted from the "act of God," the carrier will not be held liable.<sup>4</sup> But under the exception, "unavoidable casualty," the carrier is bound to show the origin and cause of the fire which destroyed the goods, in order to bring himself within the exception. In itself, fire is not considered an unavoidable danger, and the defendant is bound to show the origin or cause of the fire, to bring itself within the exception.<sup>5</sup> The fact that goods shipped were burned while in transit on the cars of the carrier raises the presumption that the fire and consequent loss were caused by the carrier's negligence.<sup>6</sup>

In excusing itself from liability, where such proof is required, the carrier must show that it has done what is necessary to be done, under all the circumstances; and it is not sufficient that it has done what is usual. Thus, where a quantity of potatoes were shipped in barrels to New York, and in the process of transportation were delivered by the first carrier to another,—and while

<sup>1</sup> *Wertheimer v. Pennsylvania R. Co.* 17 Blatchf. 421.

<sup>2</sup> *St. Louis, I. M. & S. R. Co. v. Bone*, 52 Ark. 26.

<sup>3</sup> *Pennsylvania R. Co. v. Miller*, 87 Pa. 395.

<sup>4</sup> *Muddle v. Stride*, 9 Car. & P. 380.

<sup>5</sup> *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.* 1 Disney, 480.

<sup>6</sup> *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605.

in the custody of the latter and while on the deck of a barge in the North river, they were frozen,—the last carrier was held responsible.<sup>1</sup> In the recent case of *Bradley Fertilizer Co. v. The Edwin I. Morrison*, decided by the Supreme Court of the United States, April 30, 1894 (153 U. S. 199, 38 L. ed. 688) Mr. Chief Justice Fuller, uses this language: “Assuming, as we must, that the damages awarded by the district court resulted from the loss of the cap and plate covering the bilge pump hole, the question to be determined is whether that loss was occasioned by a peril of the sea, or by the condition of that covering as it was when the vessel entered upon her voyage. If, through some defect or weakness, the plate and cap and the screws which secured it came off or if the cap and plate were so made or so fastened as to be liable to be knocked off by any ordinary blows from objects washed by the sea across the decks, then the vessel was not seaworthy in that respect, and the loss could not be held to come within the exception of perils by the sea, although the vessel encountered adverse winds and heavy weather . . . as said on circuit by Mr. Justice Gray in *The Caledonia*, 43 Fed. Rep. 681, 685, ‘In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship-owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence.’

In *The Glenfruin*, 10 Prob. Div. 103, the same rule is thus expressed by Butt, J.: ‘I have always understood the result of the cases from *Lyon v. Mells*, 5 East, 428, to *Kopitoff v. Wilson*, L. R. 1 Q. B. Div. 377, to be that under his implied warranty of seaworthiness, the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had these cases left any doubt in my mind, it would have been set at rest by the observations of some of

<sup>1</sup> *Wing v. New York & E. R. Co.* 1 Hilt. 231.

the peers in the opinion they delivered in the case of *Steel v. State Line SS. Co.* L. R. 3 App. Cas. 72.' Perils of the sea were excepted . . . but the burden of proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants contributed.' It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated. We do not understand from the findings that the severity of the weather encountered by the *Morrison* was anything more than was to be expected upon a voyage, such as this, down that coast and in the winter season, or that she was subjected to any greater danger than a vessel so heavily loaded, and with a hard cargo, might have anticipated under the circumstances. The especial peril which seemed at one time to have threatened her safety, was directly attributable to the water taken aboard through the uncovered bilge pump hole, which rose from eighteen inches about 5 A. M. to seven feet at about 9 A. M., so that she was necessarily sinking deeper and deeper, while the absorption by the guano added to the dead weight, and increased the danger of her going down.

If, however, the vessel had been so inspected as to establish her seaworthiness when she entered upon her voyage, then upon the presumption that that seaworthiness continued the conclusion reached might follow, but we are of opinion that precisely here respondents failed in their case. From the 6th and 7th findings it appears that the vessel was built in 1873; that the bilge pump hole had not been used for four or five years, if at all; and that the cap and plate were painted over whenever the waterway was painted; and, from the findings above quoted, that these holes were dangerous unless the caps and plates were kept tight and secure; that the hold of the wood might become weakened by the formation of verdigris about the brass screws; that tapping with a hammer or unscrewing the cap might have developed any inse-

<sup>1</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The *Montana*") 129 U. S. 397, 438 [32: 788, 791].

curity, if there were any; that no such tests were applied; but that the caps and plates appeared all right to visual observation. But this was not enough to establish the fact of security; and the 12th finding, that examination by the eye is such that a reasonably prudent master or owner might be expected to give such coverings in order to determine their seaworthiness, does not give it that effect. The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure. Their warranty that the vessel was seaworthy in fact “did not depend on their knowledge or ignorance, their care or negligence.” The burden was upon them to show seaworthiness, and if they did not do so, they failed to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact. In relying upon external appearances in place of known tests, respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement. The court are unwilling by approving resort to mere conjecture as to the cause of the disappearance of this cap and plate to relax the important and salutary rule in respect of seaworthiness.<sup>1</sup>

<sup>1</sup> *The Reeside*, 2 Sumn. 567, 574; *Douglas v. Scougall*, 4 Dow. P. C. 269.

## CHAPTER VII.

### FREIGHT CHARGES REGULATED BY VALUE OF ARTICLE.

- § 50. *Charges and Liability Proportioned to Value.*
- § 51. *Tariff Value and Liability Must be in Reasonable Proportion.*
- § 52. *Tariff Based on Value Without Stating Limit of Liability.*
- § 53. *Fraud or Imposition Respecting Value and Estoppel.*
- § 54. *Carrier May Recover Where Value of Goods Concealed.*
- § 55. *When Limit Applies to each Article.*
- § 56. *Statutory Provisions Respecting Statement of Value.*
- § 57. *Limiting Time for Commencing Action.*
  - a. *Stipulation Regarding Notice to Consignee.*

#### § 50. *Charges and Liability Proportioned to Value.*

To what extent is a common carrier entitled to contract in limitation of his common law liability? This is a question, in so far as it applies to carriers by land, upon which there has been great contrariety of opinion in different courts, the earlier cases holding that it was against public policy, and hence impossible, for common carriers to guard themselves by any stipulations whatever against liability from loss arising from any other cause than the act of God or the public enemy. While the later cases have materially modified this rule in the carrier's favor, and while he could not become either an ordinary bailee or a private carrier, permitted him not only to contract so as to change the extent of his liability as fixed by the common law, but such contracts—within the reasonable limit recognized by modern decisions—when made with his employer, became almost entirely the measure of his responsibility, in case of loss, although they do not change his status as a common carrier nor his duty as such in any other regard, for nothing the carrier can do will change his actual position as a common carrier, in his relation to his employer. But all

stipulations in contracts by carriers amounting to a denial or repudiation of the duties which are of the very essence of their employment will be regarded as unreasonable, contrary to public policy, and void.<sup>1</sup>

The decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent at least, contract in limitation of his common law liability, "provided," as stated in *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556, "the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy." The shipper and the common carrier are thus authorized to enter into an express agreement, within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value to a designated place for an agreed price. The recognition of the validity of such an agreement is not violative of any sound rule of public policy. Indeed, public policy requires the upholding of such an agreement as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance. To illustrate: A has a box of tinware of the value of five dollars, which he wishes to send to Boston by B, a common carrier. The box is delivered to B, under an agreement that no sum beyond \$50 shall be collected in case of loss, at which

<sup>1</sup> *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126; *The Hugo*, 57 Fed. Rep. 403; *Galveston, H. & S. A. R. Co. v. Bull*, 80 Tex. 602; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191; *Davidson v. Graham*, 2 Ohio St. 131; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hooper v. Wills, Fargo & Co.* 27 Cal. 11, 85 Am. Dec. 211; *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) May 3, 1890; *Fort Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Atchison, T. & S. F. R. Co. v. Temple*, 13 L. R. A. 362, 47 Kan. 7; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 180, 23 L. ed. 872, 875; *Kirby v. Adams Exp. Co.* 2 Mo. App. 369; *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348. But see *Elliott v. New York Cent. & H. R. R. Co.* 33 N. Y. S. R. 861; *Kenny v. New York Cent. & H. R. R. Co.* 125 N. Y. 422; *American Exp. Co. v. Sands*, 55 Pa. 140; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Johnson v. Alabama & V. R. Co.* 69 Miss. 191; *Louisville & N. R. Co. v. Owen*, 14 Ky. L. Rep. 118; *Alabama G. S. R. Co. v. Thomas*, 83 Ala. 343.



sum the article is valued, unless another value is expressly fixed in the agreement, no information being given as to the contents of said box. What is the degree of care which B is expected to exercise in the transportation of this box? Manifestly that degree of care which is commensurate with a box whose value does not exceed that stipulated in the contract, to wit, \$50. B's maximum liability in case of loss being known to him beforehand, he will naturally exercise such a degree of care as would ordinarily insure the safe delivery at its destination of an article of this value. Moreover, he is only paid for assuming a risk to the extent of \$50, and he has graduated his charge for carriage accordingly. Such an agreement certainly strikes one as eminently fair and reasonable. Neither party is deceived or misled thereby. The shipper on the one hand is insured of the safe delivery of his goods at their destination, or their value in money, in case of loss, and the carrier, on the other hand, proportions his care to the liability which he has assumed. Both parties thus act understandingly and intelligently. There is little opportunity for fraud on the part of the shipper, and none for overcharge on the part of the carrier. To illustrate again: A wishes to send a box of diamonds, valued at \$500, to Boston, Mass., and employs B, a common carrier, to transport the same thence under an express agreement which stipulates, among other things, that the value thereof is \$50, the charge for expressage being based upon that valuation. As in the former case, B assumes, and has the right to assume, that the value of this package does not exceed the sum of \$50, and he therefore proportions his care accordingly. The package is lost by B, whereupon A seeks to hold him liable for the actual value of said package, which was many times larger than that agreed upon. B was only paid for the care and transportation of a package of the value of \$50, and the degree of care which he used was sufficient for a transaction of that sort, while it was quite insufficient for a transaction of the sort which he was induced by misrepresentation on the part of A to undertake. Had he been apprised of the actual value of this package, he would have exercised that degree of care which was commensurate therewith, and would also have graduated his charge accordingly. To allow

A to repudiate his contract with B in case of loss, and hold the latter to his strict common law liability, under the circumstances, is little less than to permit him to perpetrate a fraud under the guise of enforcing a legal right. This illustration fairly shows the unreasonableness and injustice of any other rule of liability.

But the main contention adverse to this position is that a common carrier cannot limit its liability for loss of goods occasioned by its own negligence, and, in support thereof, several cases may be cited. Thus, it is said that a shipper may agree, in consideration of special rates or privileges, on values in case of loss or injury, if the agreed values are not unreasonable or arbitrary and no agreement is made exempting the carrier from the consequences of negligence or bad faith.<sup>1</sup> And that a stipulation in a freight receipt limiting the amount for which the carrier will be liable, can exempt the carrier from a greater responsibility only when a loss occurs without the carrier's negligence or fault.<sup>2</sup> A contract between a carrier and an importer, providing that the liability of the carrier for damage to valuable livestock shall not exceed \$100 for each animal except by special agreement, is void as regards damages to the animals shipped, by the carrier's negligence, and cannot be sustained as a valuation placed upon the property,<sup>3</sup> and a decision in a court of common pleas in Ohio seems to deny that any incidental qualification of the carrier's negligence is permissible, declaring that an agreed valuation of property to be transported by a public carrier, forming the basis for freight charges under a stipulation that no more than such valuation shall be recovered by the shipper in case of loss or injury to the property, even if caused by the negligence of the carrier, is not binding upon the shipper, and cannot defeat his right to recover the market value of the property at the time and place of shipment upon its loss by the carrier's negligence.<sup>4</sup> There are

<sup>1</sup> *Georgia Pac. R. Co. v. Hugbart*, 90 Ala. 36.

<sup>2</sup> *Southern Exp. Co. v. Seide*, 67 Miss. 609. See also *Southern Pac. R. Co. v. Mullins*, 75 Tex. 300; *St. Louis, A. & T. R. Co. v. Robbins* (Tex. App.) Dec. 14, 1889; *Down v. St. Louis, K. & N. R. Co.* 38 Mo. App. 408; *The City of Norwich*, 4 Ben. 271.

<sup>3</sup> *Ells v. St. Louis, K. & N. W. R. Co.* 52 Fed. Rep. 903.

<sup>4</sup> *Ambach v. Baltimore & O. R. Co.* 30 Ohio L. J. 111.

many authorities that state the general rule that a carrier's liability for negligence cannot be limited by a contract made directly for that purpose.<sup>1</sup>

Unquestionably the better rule and the one sustained by the best reason and authority, is that it is not competent for a common carrier to stipulate for exemption from loss occasioned by his own negligence or that of his servants. Such an exception is not just and reasonable in the eye of the law. Nor is it necessary to admit such an exception, for a stipulation, fixing the value of live-stock in a carrier's contract, if fairly made as the basis of the rate of compensation for the carrier's services and risks, will constitute the limit of recovery for loss of the stock, although it is caused by the carrier's negligence; but such limitation is invalid in case of negligence, if its purpose was merely to limit the amount of the carrier's liability;<sup>2</sup> a carrier cannot fraudulently exempt itself by contract from paying the full value of goods destroyed or lost by its negligence,—as, by stipulating in a contract of shipment that the amount of recovery for a stallion worth several thousand dollars shall not exceed \$200.<sup>3</sup> For, as stated by Blatchford, J., in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 340, 28 L. ed. 717, 721, "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carriers the measure of care due to the value agreed on. The carrier is bound to respond in that value for any negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract fairly

<sup>1</sup> *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Newborn v. Just*, 2 Car. & P. 76; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Snider v. Adams Exp. Co.* 63 Mo. 376, 383; *Union Exp. Co. v. Graham*, 26 Ohio St. 595, 598; *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Muser v. American Exp. Co.* 1 Fed. Rep. 382; *Southern Exp. Co. v. Seide*, 67 Miss. 609.

<sup>2</sup> *Alair v. Northern Pac. R. Co.* 19 L. R. A. 764, 53 Minn. 160.

<sup>3</sup> *Baughman v. Louisville, E. & St. L. R. Co.* 14 Ky. L. Rep. 268.

entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss." The case from which we have thus quoted was one in which the loss happened from the negligence of the defendant. The court had previously declared in the same case (page 338) that "it is the law of this court that a common carrier may by special contract limit his common law liability; but he cannot stipulate for exemption from the consequences of his own negligence, or that of his servants," thus expressly affirming the doctrine previously laid down by that learned court in *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *The Lydian Monarch*, 23 Fed. Rep. 2. But although the loss did occur from the negligence of the defendant, the court upheld the agreement as to the value of the property on the ground, as forcibly stated in the opinion, that there is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier.

A stipulation of value, if fairly made as the basis of the rate of carriage for the risk involved and the care exacted, will limit the recovery, although it is caused by the carrier's negligence; but if its purpose was merely to limit the amount of the carrier's liabil-

ity for his negligence, it is invalid.<sup>1</sup> The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume.

The agreement as to value, in such case, stands as if the carrier had asked the value of the property, and had been told by the plaintiff the sum inserted in the contract. The rule laid down in *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360, that "an express company cannot by special contract or special acceptance limit its liability for loss of goods, resulting from the negligence of the company or its servants," is not in conflict with the case just quoted from upon this point, and it seems that the learned court which rendered this decision, misapprehended the ruling in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, in declaring that that case had decided that a common carrier could limit its liability even as against its own negligence. The real distinction between these two cases is not in the rule adopted by each, but in the application thereof. In the *Grogan* case the court holds that an agreement as to value in case of loss by negligence is not binding on the parties, on the ground that to hold the contrary would be to uphold the carrier in stipulating against his own negligence, although it holds at the same time that an agreement as to value "would be a protection against liability beyond that amount except for negligence." In this respect the court followed the case of *American Exp. Co. v. Sands*, 55 Pa. 140, and *Farnham v. Camden & A. R. Co.* 55 Pa. 53, that is to say, these cases hold that an agreement as to value in case of loss is valid and binding, excepting only where the loss is occasioned by the negligence of the common carrier or his servant; while in the *Hart* case, before referred to, the court holds that the agreement as to value is also valid and binding where the loss is occasioned by the negligence of the common carrier, and that so to hold "has no tendency to exempt from liability for negligence." The reasoning in the last named case is cogent and con-

<sup>1</sup> *Alair v. Northern Pac. R. Co.* 19 L. R. A. 764, 53 Minn. 160.

vincing, and will be generally accepted in preference to the authorities which hold to the contrary.<sup>1</sup>

In a court which had followed the Grogan case to some extent, a recent decision is to the effect that while a carrier cannot wholly exempt himself from liability for negligence, he may, by special contract fairly made with the shipper and signed by him in consideration of a reduced freight charge, restrict his liability for loss, even through his *prima facie* negligence, to a valuation fixed by the agreement.<sup>2</sup> Where a shipping receipt, signed by the carrier's agent only, limited the amount for which damages would be paid, while a special agreement under seal signed by the shipper was void as against public policy because attempting to release the carrier from all liability, if both papers constitute but one contract both are tainted by the illegality, and are therefore void.<sup>3</sup> And to shield the carrier in case of his neglect, that cause must be expressly stated or distinctly expressed. A clause in a bill of lading which contains a stipulation as to the value of the property and a contract to carry it at reduced rates, that such valuation shall cover loss or damage from "any cause whatever," does not limit the amount of recovery to such valuation, where the loss is due to the carrier's negligence.<sup>4</sup> But the rate of charges as shown by the waybill for an article requiring special care, if it does not expressly contract to excuse the carrier from the exercise of the care required by law, although it is the rate for transportation by ordinary cars, will not limit the care to be exercised by the carrier or restrict its liability.<sup>5</sup> General words limiting the amount of liability will not extend to losses occa-

<sup>1</sup> See also *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Kallman v. United States Exp. Co.* 3 Kan. 205; *Brehme v. Adams Exp. Co.* 25 Md. 328; *Snider v. Adams Exp. Co.* 63 Mo. 376; *Lery v. Southern Exp. Co.* 4 S. C. 234; *Boorman v. American Exp. Co.* 21 Wis. 154; *Ballou v. Earle*, 14 L. R. A. 433, 17 R. I. 441.

<sup>2</sup> *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, 36 W. Va. 524.

<sup>3</sup> *Woolburn v. Cincinnati, N. O. & T. P. R. Co.* 40 Fed. Rep. 731.

<sup>4</sup> *Weller v. Pennsylvania R. Co.* 134 Pa. 310; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Black v. Goodrich*, 55 Wis. 319, 42 Am. Rep. 713; *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640; *Froman v. American Merchants U. Exp. Co.* 5 Thomp. & C. 22.

<sup>5</sup> *Beard v. Illinois Cent. R. Co.* 7 L. R. A. 280, 79 Iowa, 518.

sioned by negligence. Such a limitation as to negligence must be clear and explicit.<sup>1</sup>

§ 51. *Tariff Value and Liability must be in Reasonable Proportion.*

There must not be an unreasonable difference between the charges made with and without the limitation of liability.<sup>2</sup> A consideration such as a reduction of rates or some other advantage or benefit is necessary to support a special agreement limiting the amount of liability in case of negligence.<sup>3</sup> A stipulation placing an agreed valuation upon goods delivered to an express company for transportation, which is inserted in the shipping receipt and is designed to fix the extent of the company's liability in case the goods are lost, is binding on the shipper if he understands its purpose and knows that the freight charges are proportioned to the nature and extent of the risk; and the fact that neither the value of the goods nor the rate of charges is asked in a particular case is immaterial.<sup>4</sup> Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common, or ordinary negligence on the part of the carrier, its agents or servants.<sup>5</sup> A limitation of amount of liability is valid also in respect to baggage where extra compensation is required for greater

<sup>1</sup> *Black v. Goodrich Transp. Co. and Westcott v. Fargo*, *supra*. See, *ante*, § 16.

<sup>2</sup> *Harrison v. London, B. & S. C. R. Co.* 2 Best & S. 122.

<sup>3</sup> *Doan v. St. Louis, K. & N. W. R. Co.* 38 Mo. App. 408; *Adams Exp. Co. v. Harris*, 120 Ind. 73; *McFadden v. Missouri Pac. R. Co.* 92 Mo. 343.

<sup>4</sup> *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453.

<sup>5</sup> *Pacific Exp. Co. v. Foley*, 12 L. R. A. 799, 46 Kan. 457.

value.<sup>1</sup> But a passenger who pays extra freight for a package after disclosing the contents to the agent is not limited in recovering for the loss of the same, by the provisions in her ticket that no more than £5 can be recovered for the loss of baggage.<sup>2</sup> A carrier may contract for exemption from liability for freight beyond a stipulated sum unless its just and true value is stated.<sup>3</sup>

According to the decided weight of modern authority, a valid contract limiting the liability of a carrier to a certain agreed valuation of the property carried, may be made where it is just and reasonable in its terms and a reduced rate of freight is made the consideration for it.<sup>4</sup> A shipper of goods who by special contract agrees upon a value to be placed upon them in case of loss, and in consideration thereof obtains a reduced rate of transportation, is bound by his agreement, and is estopped from showing that the real value of the goods was greater than that specified in the contract.<sup>5</sup> A limitation of the liability of a carrier, to a specified amount, for property carried at a reduced rate, is valid.<sup>6</sup> A stipulation in the contract of shipment by the railroad company, that in the event of the loss or damage to goods the company will only be responsible for their value at the place and time of shipment, is just and reasonable.<sup>7</sup> A limitation of liability as to amount in

<sup>1</sup> *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 25 L. ed. 531; *Hopkins v. Westcott*, 6 Blatchf. 64.

<sup>2</sup> *Wasserberg v. Cunard Steamship Co.* (N. Y. City Ct.) 8 Misc. 78, 58 N. Y. S. R. 838.

<sup>3</sup> *Boorman v. American Exp. Co.* 21 Wis. 154.

<sup>4</sup> *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849, 86 Va. 481; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Bradford v. Cunard SS. Co.* 147 Mass. 58; *Berger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Brown v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 568; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Earnest v. Southern Exp. Co.* 1 Woods, 573; *Muser v. Holland*, 17 Blatchf. 412; *Muser v. American Exp. Co.* 1 Fed. Rep. 382; *Zimmer v. New York Cent. & H. R. R. Co.* 42 N. Y. S. R. 63; *Steers v. Liverpool, N. Y. & P. SS. Co.* 57 N. Y. 1, 15 Am. Rep. 453; *Nicholson v. Wilton*, 5 East, 507; *Izett v. Mountain*, 4 East, 371; *Clay v. Willan*, 1 H. Bl. 298; *McCance v. London & N. W. R. Co.* 7 Hurlst. & N. 477; *Kallman v. United States Exp. Co.* 3 Kan. 205.

<sup>5</sup> *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55.

<sup>6</sup> *Zimmer v. New York Cent. & H. R. R. Co.* 42 N. Y. S. R. 63.

<sup>7</sup> *Louisville & N. R. Co. v. Oden*, 80 Ala. 33; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 314, 322, 29 L. ed. 873, 878.



case of loss of the goods shipped is valid if agreed to by the shipper.<sup>1</sup>

A common carrier may by special contract limit his liability for loss of goods to an amount agreed on as the value, in consideration of a reduced rate of freight, provided no extortion or coercion is practiced or threatened, and no undue advantage taken of the shipper; but such special contract does not protect the carrier against liability for fraud, nor for intentional, wanton, or reckless negligence.<sup>2</sup> That a fair bona fide valuation of goods as a basis for the charges of a carrier is binding on the shipper, is decided in many cases, and no well considered case is to the contrary.<sup>3</sup> A limitation of the recovery to the amount of the invoice or declared value of the goods, is reasonable, and may be enforced although the loss was occasioned by negligence.<sup>4</sup> Where the carrier, by contract, limits his liability to a certain amount, unless the value of goods is stated at time of shipment, silence as to value on part of shipper, although no inquiry is made by carrier, and no artifice used to deceive him or conceal the value, will operate to relieve him from liability for ordinary negligence beyond the amount limited.<sup>5</sup>

It is proper for the carrier to make inquiry as to the value of the goods delivered to him, and the consignor must answer at his peril: and if such inquiry is not made, and the goods are received at such valuation as is asked with reference to its bulk, weight

<sup>1</sup> *Fay v. The New World*, 1 Cal. 348; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63; *Chicago, R. I. & P. R. Co. v. Harmon*, 17 Ill. App. 640; *Broen v. Wabash, St. L. & P. R. Co.* 18 Mo. App. 568; *Neustadt v. Adams*, 5 Duer. 43; *Moriarty v. Harnden's Express*, 1 Daly, 227; *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Elkins v. Empire Transp. Co.* 81\* Pa. 315.

<sup>2</sup> *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178.

<sup>3</sup> *Neuburger v. Howard & Co's Express*, 6 Phila. 174; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Durgin v. American Express Co.* (N. H.) 9 L. R. A. 453; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284; *Harrey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282.

<sup>4</sup> *The Lydian Monarch*, 23 Fed. Rep. 298; *The Hudji*, 18 Fed. Rep. 459; *Alair v. Northern Pac. R. Co.* 19 L. R. A. 764, 53 Minn. 160.

<sup>5</sup> *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608, affirming 60 N. Y. 35, 20 Am. Rep. 442, 50 How. Pr. 457. See, also, *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Steers v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1; *Landsberg v. Dinsmore*, 4 Daly, 490.

or external appearance, the carrier has been held liable for the loss, irrespective of its value.<sup>1</sup> Noncompliance with conditions in a shipping receipt, that the carrier will not be liable for loss of statutory unless a memorandum in writing stating the character and value of the articles is delivered by the shipper and an extra compensation paid, and that marble, unless otherwise expressly agreed, is taken at owner's risk, will not relieve the carrier from liability for negligence, if he is informed before shipment of the special and unusual value of the goods shipped.<sup>2</sup> If, after the refusal to state the value, the carrier does not insist on a higher rate, his liability may, if the circumstances justify it, be treated as a waiver, and his liability treated as at common law.<sup>3</sup> Thus, a stipulation limiting the amount of liability did not prevent recovery for the full value in case of loss by negligence, where the shipper refused to state the value, although a larger charge would have been made if he had stated it.<sup>4</sup> An agreement in a bill of lading that, in case of loss of the goods shipped, damages shall be recovered at the rate of \$5 per 100 pounds, without reference to the actual value of the goods, is both unreasonable and arbitrary and is not binding on the shipper.<sup>5</sup> In other cases which also deny the validity of such contracts, the limitation did not purport to be based on the value of the property.<sup>6</sup> An arbitrary valuation put upon goods by the carrier, without any request or any valuable consideration will not be binding on the shipper.<sup>7</sup> So an amount inserted in a bill of lading by the carrier's agent without any questions as to the value of the property,

<sup>1</sup> *Gorham Mfg. Co. v. Fargo*, 45 How. Pr. 90, 3 Jones & S. 434.

<sup>2</sup> *Ruthbone v. New York Cent. & H. R. R. Co.* 140 N. Y. 48.

<sup>3</sup> *Behreno v. Great Northern R. Co.* 31 L. J. Exch. 299.

<sup>4</sup> *Conover v. Pacific Exp. Co.* 40 Mo. App. 31.

<sup>5</sup> *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Lang v. Pennsylvania R. Co.* 154 Pa. 342.

<sup>6</sup> *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Levy v. Southern Exp. Co.* 4 S. C. 234.

<sup>7</sup> *Rosenfeld v. Peoria, D. & E. R. Co.* 103 Ind. 121, 53 Am. Rep. 500; *Baughman v. Louisville, E. & St. L. R. Co.* 14 Ky. L. Rep. 263.

and without notice to the shipper of any difference in rates in case of such limitation, was held not to limit the carrier's liability.<sup>1</sup>

The rule and the reason thereof is well stated in *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453. Defendant's agent received from the plaintiff a box weighing thirty-seven pounds, and containing silverware of the value of \$680.20, to be carried by the defendants to the city of New York, and there delivered to Theodore B. Starr. There was in the plaintiff's possession a book of blank receipts furnished him by the defendants, to be filled up and signed by the defendants on the delivery of the goods to them for carriage. At the time of the reception of the box in question, one of these receipts was signed and delivered to the plaintiff by the defendant's agent. The printed portion of the receipt contains the following, among other stipulations: "It is further agreed that this company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless, in every case, the said loss or damage be proved to have occurred from the fraud or gross negligence of said company, or their servants; nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of \$50, at which sum said property is hereby valued, unless the just and true value thereof is stated herein." The value of the box and contents was not stated, nor was any inquiry concerning its value made by the defendants or their agent, and neither the defendants nor their agent had knowledge of the value thereof. The sum to be charged for carrying the box was not mentioned, and no charge therefor was paid by the plaintiff, it being understood that the express charges were to be paid by the consignee upon delivery. The goods were never delivered, but were lost or stolen. The price fixed by the defendants for the carriage of this box was 75 cents, but the plaintiff was not informed what the charge in this particular instance would be. If the actual value of the goods had been stated, the regular express charge would have been \$3.75. The plaintiff is, and for many years has been, a manufacturer of and

<sup>1</sup> *Chicago & N. W. Co. v. Chapman*, 8 L. R. A. 508, 133 Ill. 96.

dealer in silverware, at Concord, and during that time the defendant company has received from him, to be carried by express, thousands of packages and boxes, the value of which in many instances was more than \$50, giving receipts like that given on this occasion, in which the value of the box or package was not inserted, and concerning which no information was given or inquiry made. The receipt signed by the defendant's agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the court declared that the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he was conclusively presumed to assent to its conditions.<sup>1</sup> It is recognized that it is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable.

In *Moses v. Boston & M. R. Co.* 34 N. H. 90, while adhering to the rule that the legal responsibility of a common carrier cannot be discharged by a public notice, the court says: "We do not mean to hold that there are no cases in which the carrier may, by notice, define and qualify his responsibility. It may be quite reasonable that he should insist on proper information as to the value of the article which he carries. This would not seem to be any infringement upon the principle of the ancient rule. He must have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. We can see nothing that ought to prevent him from requiring notice of the value of the commodity delivered to him, when, from its nature, or the shape

<sup>1</sup> *Merrill v. American Exp. Co.* 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

and condition in which he receives it, he may need the information; nor why he should not insist on being paid in proportion to the value of the goods, and the consequent amount of his risk." In conformity with these views, conditions and stipulations designed to secure to carriers information as to the character and value of the articles delivered to them, and to limit their responsibility to the amount and extent of the risk apparently assumed by the carrier and paid for by the customer, are upheld as just and reasonable.<sup>1</sup> In *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453, the stipulation as to an agreed valuation inserted in the shipping receipt taken by the plaintiff was designed to determine the extent of the defendants' liability in case of loss of the goods, and the plaintiff so understood it. The plaintiff also knew that the freight charges were proportioned to the nature and extent of the risk, and, although in this instance the express charges were not mentioned, the presumption is conclusive that the plaintiff knew that the rate would be largely increased if it was fixed by the actual value of the package. The case states that the plaintiff had previously sent thousands of packages and boxes by the defendants, the value of which in many instances exceeded \$50, and that the price fixed by the defendants for the carriage of the box in controversy was 75 cents, when, if the actual value of the goods had been stated, the regular express charge would have been \$3.75. In the opinion of the court it does not change the case that the price of carriage was not mentioned, or that no inquiries were made as to the value of the contents of the box. Plaintiff understood that the rate would be according to the regular express rates for the carriage of a box agreed to be of the value of \$50. The plaintiff understood that he was securing transportation of the box to New York at a reduced rate (in fact, at one fifth of the regular rate) by calling the value \$50 and assuming a portion of the risks of carriage himself; and, having agreed upon a valuation for the purpose of fixing the express

<sup>1</sup> *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33; *Little v. Boston & M. R. Co.* 66 Me. 239; *Mynrin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

charges, he cannot insist that the goods are of greater value, for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants, or some other cause. The defendants agreed to respond in a sum not exceeding \$50 in case of loss, and for the purpose of the contract of transportation between the parties to the contract the goods have no greater value.<sup>1</sup> But the rule has this qualification, that an arbitrary limitation of the amount of liability which is not made with reference to the actual value of the property is not valid in case of the loss by the carrier's negligence.<sup>2</sup> And a general provision limiting the amount of liability will not apply in case of the negligence of the carrier where the amount is not fixed with reference to the value of the property.<sup>3</sup> And a shipper who enters into an agreement with a carrier to ship goods at reduced rates, in consideration of placing a valuation on his property, is estopped in case of loss from claiming a higher valuation, unless the loss results from the intentional, wanton, or reckless negligence of the carrier.<sup>4</sup> A verbal statement of value has been held sufficient.<sup>5</sup>

### § 52. *Tariff Based on Value, without Stating Limit of Liability.*

It is a rule established by some of the best authorities, and one which may be recognized as expressing the law, that when a contract is fairly made between shipper and carrier agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the

<sup>1</sup> *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 341, 28 L. ed. 717, 721; *Graves v. Lake Shore & M. S. R. Co.* *supra*; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284.

<sup>2</sup> *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Levy v. Southern Exp. Co.* 4 S. C. 234.

<sup>3</sup> *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Alabama, G. S. R. Co. v. Little*, 71 Ala. 611; *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486; *Orndorff v. Adams Exp. Co.* 3 Bush, 194, 96 Am. Dec. 207; *Kirby v. Adams Exp. Co.* 2 Mo. App. 369.

<sup>4</sup> *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, 36 W. Va. 524.

<sup>5</sup> *Wilson v. Freeman*, 3 Campb. 527.

negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations of the property after a loss has occurred.<sup>1</sup> But there is a further question. In case of loss through negligence of the carrier, is the shipper bound by the valuation which he, in answer to the carrier's inquiry, gave to the property when shipped, and which value was thereupon inserted in the bill of lading, although the bill of lading is silent as to the effect of such valuation upon the shipper's liability, and he had no actual information, and did not suppose, that his statement of value would affect the liability of the company in respect to the damage they would be liable to pay in case of loss? If the shipper, through his agent, signed a bill of lading in which the value of the property was stated, in accordance with his own valuation, at \$100, which in fact, was worth \$2000, does the fact that his first valuation was an honest mistake affect the question of the carrier's liability? If he knew the property to be worth a much larger sum when he gave the value at \$100, there was, at least, concealment, even though he did not know or believe that such incorrect valuation would affect the carrier's liability for damage in case of loss, and perhaps thought it would only enable him to get a lower rate of freight. That the valuation made by the shipper affects the care required to be taken of it in transportation by the carrier, without an express, distinct agreement to that effect, will not be questioned. No one but understands that his property, valued at \$50, will get, and the law will require, less care and protection in transporting it than property valued at \$1000, and that he will pay less for such transportation, though it is of equal bulk. Upon the question whether the carrier was negligent in transporting the property, its value, as stated by the shipper, and relied on by the carrier, in the absence of anything which should cause him to discredit such valu-

<sup>1</sup> *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Schouler, Bailm.* § 457.

ation, would be conclusive, so far as value is an element of the inquiry. It has been held that, if the owner conceal the value or nature of the article, the carrier will not be liable for its loss. Thus, Judge Kent (vol. 2, pt. 5, § 40) after stating the general rule that a common carrier is answerable for the loss of a box of goods though ignorant of its contents, and though those contents be ever so valuable, unless he has made a special acceptance, says: "But the rule is subject to a reasonable qualification, and, if the owner be guilty of any fraud or imposition in respect to the carrier,—as by concealing the value or nature of the article,—he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claims to indemnity, for it goes to deprive the carrier of the compensation which he is entitled to in proportion to the value of the article intrusted to his care, and the consequent risk which he incurs; and it tends to lessen the vigilance that the carrier would otherwise bestow. Says Schouler, in his work on Bailments & Carrier (§ 423): "A carrier is to be charged with no responsibility beyond what the thing appears on its face and the proof at command to deserve; and the sender whose conduct induces him to relax his guard, or goes to deprive him of his just compensation, puts himself without the pale of justice." That the value of the article, as stated by the owner, is a proper element to be considered in measuring the care to be bestowed upon it by the carrier, is beyond question. The reasoning of the court in *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 23 L. ed. 717, tends very strongly to uphold the position that, in the case of loss through its negligence, the shipper is bound by his own valuation of the property when delivered for transportation, though there was no express agreement to that effect. There was an express agreement in that case, but the court seems to discuss the question upon general principles. After quoting the above passage from Kent respecting it, it says: "This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies. There is no justice in allowing the shipper to be paid a large value for an article, which he has induced the carrier to take at a low rate of freight, on the assertion and agreement, that its value is a less sum than that claimed after a



loss. It is just to hold the shipper to his agreement, fairly made, as to value, even when the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight, and secure the carriage, if there is no loss; and the effect of disregarding the agreement after a loss is to expose the carrier to a greater risk than the parties intended he should assume." The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

It would seem as if good morals required that the same rule should hold good in respect to a statement of value made by a shipper, even though there is no express contract that any loss that might occur should be measured by such statement, as would apply in case of an agreement that a statement of value should govern in case of loss. A shipper should not be allowed to reap the benefit of his statement of value, the natural consequence of which causes the carrier to treat freight in a certain way, resulting in its loss. Actual notice, given by a common carrier to his customer, specifying the terms on which he receives and carries goods, becomes parcel of the contract when it is proved that the property was delivered on the terms thus offered. And, though it be not made the basis of a contract, it often becomes effective to shield the carrier from liability for things of special and pecu-

liar value, not disclosed at the time of delivery ; for it appears to be agreed that the carrier may in this manner require the shipper to state the nature or value of the property, at the risk of having it received and carried as an article of ordinary value. The carrier does not impose an illegal condition. He asks for reasonable information bearing on the transaction ; and the shipper is left free to act on his own discretion, accepting the legitimate consequences of his conduct.<sup>1</sup> Why is it not a legitimate consequence of his conduct to hold him to his own valuation when he sues for loss of the property so valued ? And why may not the carrier require the shipper to state the nature or value of the property at the risk of being obliged to stand by the value so stated, in reliance upon which it has been accepted and carried, even though it is not made the basis of a contract, as well as at the risk of having the property carried as an article of ordinary value ? There is no reason why the carrier should not make the demand and the shipper be bound by his answer, and such is the rule of law.<sup>2</sup>

### § 53. *Fraud or Imposition Respecting Value and Estoppel.*

The principle which governs the compensation of carriers is that they are to be paid in proportion to the risk they assume. It is the duty of every person sending goods by a carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased, or his care and diligence may be lessened.<sup>3</sup> Fraud, imposition or unfair concealment as to the contents or value of the goods, will relieve the carrier of responsibility.<sup>4</sup> The owner of gold dust represented to be of a certain value less than its real value, who pays the carrier for its transportation according to the smaller value, and after it is lost by highway robbery accepts the amount which he had represented it to be worth, and gives a re-

<sup>1</sup> Edw. Bailm. § 569.

<sup>2</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>3</sup> *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587.

<sup>4</sup> *Phillips v. Earle*, 8 Pick. 182; *Orange County Bank v. Brown*, 9 Wend. 116, 24 Am. Dec. 129; *Warner v. Western Transp. Co.* 5 Robt. 490; *Relf v. Rapp*, 3 Watts & S. 21, 37 Am. Dec. 528.

ceipt therefor, cannot recover the difference between that sum and its real value, after the carrier has at large expense succeeded in recovering the property.<sup>1</sup> The acceptance, without suit, of an amount offered in payment of goods lost in transportation, passes the title to the carrier.

A value voluntarily fixed by the shipper with a view to obtain a low rate of freight without the carrier's knowledge that the property was of greater value, will be binding where the contract limits the recovery to the sum agreed upon.<sup>2</sup> So a general limitation of the amount of liability, unless the value of the goods is stated, is valid where the shipper undertakes to send articles of much greater value without notice to the carrier.<sup>3</sup> If the shipper be guilty of any fraud or imposition in respect to the carrier as by concealing the value or nature of the article, or delude him by his own carelessness in treating the parcel as a thing of no value, he cannot hold the carrier liable for the loss of the goods.<sup>4</sup> Where a trunk shipped on a steamship, contained jewelry, which fact the shipper did not disclose, and the bill of lading contained a provision that the carrier would not be responsible for the loss of valuable articles unless their value was expressed in the bill of lading and the shipper paid extra freight therefor, the carrier was not liable for the loss of the jewelry caused by the trunk being broken open and the jewelry stolen.<sup>5</sup> The like rule applies to the carrier, where the articles are plainly of much greater value than the limit named in the receipt. In such case, no voluntary statement of their actual value is required to enable the shipper to recover that amount.<sup>6</sup>

<sup>1</sup> *Scammon v. Wells, Fargo & Co.* 84 Cal. 311, 42 Am. & Eng. R. Cas. 400.

<sup>2</sup> *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Rosenfeld v. Peoria, D. & E. R. Co.* 103 Ind. 121, 53 Am. Rep. 500.

<sup>3</sup> *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Brehme v. Adams Exp. Co.* 25 Md. 328; *Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442.

<sup>4</sup> *Tichburne v. White*, 1 Strange, 145; *Phillips v. Earle*, 8 Pick. 182; *Malpica v. McKoon*, 1 La. 248, 20 Am. Dec. 279.

<sup>5</sup> *The Bermuda*, 29 Fed. Rep. 399.

<sup>6</sup> *Down v. Fromont*, 4 Campb. 40; *Boscovitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191; *Van Winkle v. Adams Exp. Co.* 3 Robt. 59; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Beck v. Evans*, 16 East, 243.

In a recent case<sup>1</sup> the action was in assumpsit to recover the sum of \$579, being the value of a box of diamonds which the plaintiff delivered to the servant and agent of the defendants to be by them transported by express to New Bedford, in the state of Massachusetts. A jury trial was waived, and the case was tried by the court on the law and the facts. The defendants, who are common carriers of merchandise for hire, received from the plaintiff at Providence, on the 26th day of July, 1890, a package containing diamonds of the value aforesaid, to be by them delivered to the consignee, at New Bedford, Mass. The plaintiff had, and for a considerable time previous to the above-named date had had, in his possession and constant use a book of the defendants' contract receipt blanks, at the top of each page of which was printed what purports to be a mutual agreement between the shipper and the common carrier, which agreement, in so far as it is material, provides that the defendants "are not to be held liable or responsible for any loss or damage to said property . . . unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company, or their servants; nor in any event shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless especially insured by them, and so specified in this receipt, which insurance shall constitute the limit of the liability of Earle & Prew's Express." One of these blanks the plaintiff filled out for the addressed package in question, but gave no value thereof, although there was a blank column in said receipt marked "value." This receipt was signed by the defendants' agent when the plaintiff gave the package to the agent. The defendants had no knowledge of the contents or value of said package except as stated in said receipt at the time of its delivery to them, nor did they make any inquiry of the plaintiff concerning the same. This package was lost by the negligence of the defendants' servant before it reached their office, and said defendants admit their liability therefor under said agreement, and offer to pay the said sum of \$50, which, they con-

<sup>1</sup> *Ballou v. Earle*, 14 L. R. A. 433, 17 R. I. 441. See *post*, chapter VIII. § 72, on "Contributory Negligence of Shipper."

tend, is the limit of their liability. The plaintiff testifies that his reason for not giving any value to the package was because the expressage was to be paid by the consignee. The defendants, on the other hand, testify that the reasons given them by the plaintiff for not giving any value to the package in said receipt were that it cost more money, and that the consignee had previously complained of the charges of expressage in cases where the values had been given, and that he adopted this mode to lessen said charges. The court concludes that the purpose of the plaintiff in not giving any value to the package was to save, either to himself or to the consignee, and it matters not which, the additional expressage which would have been charged by the defendants if the real value had been given; for it must be presumed from the terms of the receipt that, as the defendants assume a liability only to the extent of the valuation therein named, the rate of expressage is graduated by said valuation. Under this state of facts the plaintiff's contention is that the express assent of the owner of the goods to the restriction of the carrier's liability must be found to give effect to it in any case. But the opinion of the court is that the decided preponderance of the authorities is to the contrary; and that the well settled rule now is, that in the absence of fraud, concealment, or improper practice, the legal presumption is that stipulations limiting the common law liability of common carriers contained in a receipt given by them for freight were known and assented to by the party receiving it.<sup>1</sup>

In the case at bar a printed *fac simile* of the receipt in question is produced, which shows in the opinion of the court that the terms and conditions upon which the defendant received the goods in question must have been well known to the plaintiff. And more

<sup>1</sup> *Belger v. Dinsmore*, 51 N. Y. 166, 10 Am. Rep. 575; *Steers v. Liverpool*, N. Y. & P. S. S. Co. 57 N. Y. 1, 15 Am. Rep. 453; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Quinby v. Boston & M. R. Co.* 5 L. R. A. 846, 150 Mass. 365; *Burke v. South Eastern R. Co.* L. R. 5 C. P. Div. 1; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; *Monitor Mut. F. Ins. Co. v. Buffum*, 115 Mass. 343; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163. For a full discussion of the contrary doctrine, see *Hollister v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455, and cases cited.

especially is this to be taken for granted from the fact that a book of the defendants, filled with receipt blanks identical with this, was in the plaintiff's possession, and in almost daily use by him. From an examination of said *fac simile* it is evident that there was not only no attempt to conceal the terms and conditions of the bailment on the part of the defendants, but, on the other hand, that it had been their purpose to make the same specially prominent and noticeable. It is all printed on one side of the paper, and at the top thereof. It is headed by the caution, printed in bold type, "Read the Conditions of this Receipt," and all the printed matter precedes the signature of the agent of the defendants. The conclusion is reached, therefore, that the receipt in question ought to be regarded as having received the assent of the plaintiff, and as being, as its language purports, the mutual agreement of the parties touching the package in question.

#### § 54. *Carrier May Recover Where Value of Goods Concealed.*

The right of the carrier to be compensated according to a stipulation for payment of freight, based on the actual value of the goods transported, was ruled in the United States District Court for the Southern District of New York in a recent case. The libel was filed to recover an alleged balance of freight due on an importation of diamonds received by the respondent, and entered by him at the customhouse under the bill of lading. The bill of lading stated the value as 7000 francs, and upon receipt of the goods by the respondent the freight on that valuation was paid. The bill of lading stated that an additional freight of 5 per cent should be paid on the total value should the real value be discovered to be greater than was declared in the bill of lading. When the freight upon the valuation of 7000 francs, as stated in the bill of lading, was paid to the libelants, and the goods delivered by them to the respondent, they had no knowledge that the real value of the diamonds in the package was any greater. The respondent, however, had knowledge of their greater value, and

entered them at the customhouse upon the same bill of lading and upon an invoice that stated the value of the diamonds to be 27,616 francs. The libelants claim to recover the additional freight of 5 per cent on the actual value, in accordance with the stipulation of the bill of lading. The lawfulness of stipulations of this character in favor of common carriers, to protect them against unknown responsibilities, and to adjust the freight according to the value and the responsibilities assumed, has been repeatedly upheld.<sup>1</sup> But for the respondent it is urged, in that case, that he is not liable beyond the amount of freight paid, because he was only an agent to sell the goods on commission. The vessel, however, it was answered by the court, had no knowledge of this fact. The circumstances sufficiently show that it was the intention of all parties that the respondent, as consignee, receiving the goods under the bill of lading, should pay whatever freight was payable, according to the terms of the bill of lading. It is not a case of any claim outside of the bill of lading, but of a claim strictly pursuant to its express stipulation. The respondent had full knowledge of its terms, and of the real value of the goods, which determined the amount of freight actually payable. There was a manifest attempt by the shipper to defraud the ship of a part of its rightful freight. The consignee had notice of this, and was bound to protect himself before turning over the proceeds of sale. Under such circumstances it was of course unnecessary to discuss theoretical questions as to the liability of a mere agent as consignee to pay freight, where the circumstances are different and of doubtful import.<sup>2</sup> But it was decided that in cases where a consignee, though a factor only, has full notice of all the facts, and obtain the goods under the bill of lading, and on the obvious undertaking to pay the freight, and does pay on the carriers' requirement at the time of delivery all the freight that the carriers suppose to be due, the consignee is properly held for any balance of freight, as well as demurrage, that may be

<sup>1</sup> See *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 38 L. ed. 717; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 442, 32 L. ed. 788, 792; *The Denmark*, 27 Fed. Rep. 141; *The Bermuda*, 29 Fed. Rep. 399, and cases there cited.

<sup>2</sup> See *Elwell v. Skiddy*, 77 N. Y. 282; *Sanders v. Van Zeller*, 4 Q. B. 260, 294.

actually owing according to the terms of the bill of lading upon the actual value of which he had knowledge.<sup>1</sup>

### § 55. *When Limit Applies to Each Article.*

Whether the stipulation is to be limited to each article making up the shipment must, in many cases, be determined by the particular facts and circumstances. Thus a limitation "for any loss or damage of any box, package or thing for over \$50" in the case of a shipment of three bales of cotton was held to apply to each bale, making \$150 for the shipment. So, a limit of damages to the invoice price of goods is to be held as the invoice price of each piece damaged.<sup>2</sup> But where three articles were enclosed in one, the limit included all the packages as one.<sup>3</sup> The limit in the absence of any special circumstances to control the matter, must be applied to the package and not to each article therein.<sup>4</sup>

### § 56. *Statutory Provisions Respecting Statement of Value.*

A stipulation is effective under U. S. Rev. Stat. § 4281, that the carrier will not be liable for specified valuable articles on the back, unless their value be expressed.<sup>5</sup> Limiting the amount of recovery for wearing apparel to \$100 in case of the loss of baggage is invalid under Iowa Code, §§ 1308, 2184.<sup>6</sup> A contract limiting the liability of a carrier to an amount less than the actual value of the property carried is invalid where a statute prohibits contracts exempting a carrier from the liability which would ex-

<sup>1</sup> *The Bermuda* and *The Denmark*, *supra*; *Philadelphia & R. R. Co. v. Barnard*, 3 Ben. 39; *Neilsen v. Jesup*, 30 Fed. Rep. 138; *Gates v. Ryan*, 37 Fed. Rep. 154, and cases there cited; *Allen v. Cottart*, L. R. 11 Q. B. Div. 782, 785; *North German Lloyd v. Henle*, 10 L. R. A. 814, 44 Fed. Rep. 100.

<sup>2</sup> *Brown v. Cunard SS. Co.* 147 Mass. 58; *Pearse v. Quebec SS. Co.* 24 Fed. Rep. 285.

<sup>3</sup> *Wetzel v. Dinsmore*, 54 N. Y. 496.

<sup>4</sup> *Buxendale v. Great Eastern R. Co.* L. R. 4 Q. B. 244; *Bernstein v. Baxendale*, 6 C. B. N. S. 251; *Henderson v. London & N. W. R. Co.* L. R. 5 Exch. 90.

<sup>5</sup> *The Bermuda*, 29 Fed. Rep. 399.

<sup>6</sup> *Davis v. Chicago, R. I. & P. R. Co.* 83 Iowa, 744.



ist without a contract.<sup>1</sup> Limitation of a carrier's liability for goods lost in transportation to the value at the place of shipment is invalid under the Texas statute.<sup>2</sup> A stipulation in a contract of shipment, limiting the liability of the carrier to a certain amount in case of damage to the property shipped, is not valid and binding on the shipper; and he may recover the damages to which he shows himself entitled under the measure of damages fixed by law.<sup>3</sup>

§ 57. *Limiting Time for Commencing Action.* See also *post*, § 70 *a, b*.

The carrier is bound to perform the service upon being paid therefor, and it is a policy, the propriety of which has been questioned in the highest courts, whether it should be allowed to exonerate itself, even from its full liability at common law, by an artifice at the risk of injury of those who are, in the ordinary course of business, compelled to employ its services.<sup>4</sup> In a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employer of the company who sent his message on the printed form.<sup>5</sup> The condition printed in the form was considered a reasonable one, and it was held that the employer must make claim according to the condition before he could maintain an action.<sup>6</sup> A condition in a receipt that an express company should not be liable for damage, unless a claim should be asserted within ninety days, will not limit a company's

<sup>1</sup> *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Booton* (Tex. App.) March 18, 1891; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 29, 1891; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) April 29, 1891.

<sup>3</sup> *St. Louis, A. & T. R. Co. v. Robbins* (Tex. App.) Dec. 14, 1889.

<sup>4</sup> *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606, and cases cited; *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Orndorff v. Adams Exp. Co.* 3 Bush, 194, 96 Am. Dec. 207; *Jones v. Voorhees*, 10 Ohio, 145.

<sup>5</sup> *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387.

<sup>6</sup> *Young v. Western U. Teleg. Co.* 2 Jones & S. 390.

liability for refusal to pay money received on a draft taken for collection.<sup>1</sup> And a similar doctrine has been applied to the conditions printed at the head of a telegraphic blank.<sup>2</sup> Early adjudications, notably that of *Gould v. Hill*, 2 Hill, 623, and *Jones v. Voorhees*, 10 Ohio, 145, were in contravention of the established English rule, and held that a common carrier could not limit his liability by recitals in the contract of carriage which would absolve him from the results of negligence, however gross. This doctrine, however, must be regarded as having been, in New York, expressly repudiated.<sup>3</sup>

It is no longer an open question whether the conventional limitation stipulated for and agreed upon in a contract in bills of lading is reasonable and binding. Contracts limiting the time within which suit shall be brought for any cause of action by the shipper have been sustained where the time limited has been five days, thirty days, and sixty days.<sup>4</sup> It is usual in policies of insurance to contract, that after the right of action has accrued action must be brought within some shorter period than that fixed by the statute of limitations, and that the lapse of this period before action is brought shall be conclusive evidence against any claim under the policy. Such a condition is valid and binding.<sup>5</sup> A carrier

<sup>1</sup> *Bardwell v. American Exp. Co.* 35 Minn. 344.

<sup>2</sup> *Breese v. United States Teleg. Co.* 48 N. Y. 132, 8 Am. Rep. 526; *Young v. Western U. Teleg. Co.* 2 Jones & S. 390; *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387; *MacAndrew v. Electric Teleg. Co.* 17 C. B. 3, cited in 2 Am. L. Rev. 615, where the authorities are collected.

<sup>3</sup> *Dorr v. New Jersey S. Nav. Co.* 4 Sandf. 136, 11 N. Y. 485, 62 Am. Dec. 125; *Parsons v. Monteath*, 13 Barb. 353; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115.

<sup>4</sup> *Thompson v. Chicago & A. R. Co.* 22 Mo. App. 321.

<sup>5</sup> *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Ames v. New York U. Ins. Co.* 14 N. Y. 253; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 46, 100 Am. Dec. 400; *Williams v. Vermont Mut. Ins. Co.* 20 Vt. 222; *Wilson v. Aetna Ins. Co.* 27 Vt. 99; *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596; *Fullam v. New York U. Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462; *Peoria M. & F. Ins. Co. v. Whitehall*, 25 Ill. 466; *Brown v. Roger Williams Ins. Co.* 7 R. I. 301; *Patrick v. Farmers Ins. Co.* 43 N. H. 621, 80 Am. Dec. 197; *Portage County Mut. F. Ins. Co. v. West*, 6 Ohio St. 599; *Portage County Mut. F. Ins. Co. v. Stukey*, 18 Ohio, 455; *Merchants Mut. Ins. Co. v. Lacroix*, 35 Tex. 249, 14 Am. Rep. 370; *Carter v. Humboldt F. Ins. Co.* 12 Iowa, 287; *Riddlesbarger v. Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 257; *Brown v. Savannah Mut. Ins. Co.* 24 Ga. 97; *Northwestern Ins. Co. v. Phoenix Oil & Candle Co.* 31 Pa. 448; *Edwards v. Lyeoming County Mut. Ins. Co.* 75 Pa. 378; *Leadbetter v. Aetna Ins. Co.* 13 Me. 267,

may lawfully require that it shall not be held liable for damages to goods carried by it, unless the shipper or consignee gives notice of his claim for damages within a reasonable time.<sup>1</sup> A notice within such reasonable time after removal of freight as secures the carrier from fraud is sufficient under a stipulation that the shipper must give written notice before removing the freight from the place of delivery, if he could not discover the injury before removal.<sup>2</sup> A provision in a bill of lading, that the shipowner is not liable for any claim of which notice is not given before the removal of the goods, is reasonable and valid, especially where the goods at the time of landing show indications of having been damaged.<sup>3</sup>

So a stipulation in a bill of lading which requires that damages for the loss of goods while *in transitu* or before delivery, shall be adjusted before their removal from the station, and the claim therefor made within thirty days to the "trace agent" of the carrier, is a reasonable provision to protect the carrier against fictions and fraudulent claims. A clause contained in the bill of lading, which provided that no claim for deficiency, damage or detention will be allowed unless made within three days after the delivery of the goods, nor for loss, unless made within seven days from the time they should have been delivered—has been held valid.<sup>4</sup> A provision of a contract of shipment, for notice by the shipper to the carrier of any claim for damages thereunder within five days from the time the property is unloaded, is a reasonable one and is not rendered inoperative by a deviation from the provisions of the contract as to the mode of transportation.<sup>5</sup> A clause virtually prescribing a statute of limitations of thirty days was

29 Am. Dec. 505; *Cray v. Hartford F. Ins. Co.* 1 Blatchf. 280; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *contra*, *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *French v. Lafayette Ins. Co.* 5 McLean, 461.

<sup>1</sup> *Coles v. Louisville, E. & St. L. R. Co.* 41 Ill. App. 607.

<sup>2</sup> *Western R. Co. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358.

<sup>3</sup> *Angel v. Cunard SS. Co.* 55 Fed. Rep. 1005.

<sup>4</sup> *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 887.

<sup>5</sup> *Pavitt v. Lehigh Valley R. Co.* 153 Pa. 302.

sustained by the court.<sup>1</sup> And in other cases, if the claim was not presented within sixty days.<sup>2</sup> The question has been much mooted, and it has been vigorously contended that the law alone should establish limitations of actions. This view was urged upon the attention of the court in *Fullam v. New York U. Ins. Co.* 7 Gray 61, 66 Am. Dec. 462, but the court then denied the doctrine, and asserted that the opposite view had so long obtained there as to become the settled law of the state.<sup>3</sup>

It is claimed that the earlier decisions of New York took the other view, which was adopted by the commissioners; but the later view in New York and other states seems to be adopted by the Supreme Court of the United States.<sup>4</sup> There are, however, very respectable authorities which announce the rule laid down by the earlier decisions of New York.<sup>5</sup> In *Southern Exp. Co. v. Caldwell*, in which a company provided in its receipt that it would not be liable for loss on any package, etc., delivered to it, unless claim should be made within ninety days, the Supreme Court held that such contract was valid; and in an elaborate opinion Justice Strong, referring to "the conflict existing in modern decisions," as to how far the carrier may by contract limit his common law liability, says: "All the modern authorities concur in holding that, to a certain extent, the extreme liability exacted by the common law originally may be limited by express contract. The difficulty is in determining to what extent, and here the authorities differ. Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation without a

<sup>1</sup> *Weir v. Adams Exp. Co.* 5 Phila. 355; *Boorman v. American Exp. Co.* 21 Wis. 153; *Oppenheimer v. United States Exp. Co.* 69 Ill. 62, 18 Am. Rep. 596; *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867; *Van Toll v. Southeastern R. Co.* 12 C. B. N. S. 75.

<sup>2</sup> *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 387; *Young v. Western U. Teleg. Co.* 2 Jones & S. 390.

<sup>3</sup> And the same view is held in *Brown v. Roger Williams Ins. Co.* 5 R. I. 394; *Northwestern Ins. Co. v. Phoenix Oil & Candle Co.* 31 Pa. 448; *Wilson v. Etta Ins. Co.* 27 Vt. 99; *Ames v. New York U. Ins. Co.* 14 N. Y. 253.

<sup>4</sup> *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556.

<sup>5</sup> *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *French v. Lafayette Ins. Co.* 5 McLean, 461.

clear and express stipulation to that effect obtained by him from his employer. And even when such a stipulation has been obtained, the court must be able to see that it is not unreasonable. . . . Hence, as we have said, it is now the settled law that the responsibility of the common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy." The reasonableness of such a limitation was settled in the affirmative by the decision in the case of *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, in which it was held that such limitation was valid, though the contract was to be performed wholly within the state. If the suit is not brought within the forty days after the injury occurred, it is barred, and cannot be maintained unless the plaintiff could show some reasonable excuse for the delay. If the defendant, by negotiations for settlement or otherwise, so acted as to justify reasonable belief on the part of the plaintiff that his claim would be settled without suit, and the plaintiff, acting on such belief, did not institute suit until after the expiration of the forty days, the defendant would be estopped from invoking the limitation.

A limitation by contract must, upon principles governing contracts, be liable to be rejected or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period.<sup>1</sup> A promise by a carrier to look up and adjust a claim made by letter is a waiver of a requirement that notice should be sworn to.<sup>2</sup> A provision in a shipping contract, limiting the time for action thereon, is waived by inducing the shipper by promise to pay to delay suit until after the time expired.<sup>3</sup> A statement by a carrier upon the delivery of part of a shipment of merchandise, that the remainder was missing and would be delivered in a few days, is a waiver of a clause in the bill of lading providing that claims for loss or damage

<sup>1</sup> *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 210-212.

<sup>2</sup> *Hess v. Missouri Pac. R. Co.* 40 Mo. App. 202.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270.

shall be made in thirty-six hours after delivery.<sup>1</sup> The clause in a bill of lading requiring suit to be brought in forty days after the damage shall occur, may be, under the facts, unreasonable, against public policy, and null and void.<sup>2</sup> A clause in a bill of lading, providing that any claim for loss or damages shall be made within thirty-six hours after delivery, does not apply to a claim for the value of a portion of a shipment of goods not delivered.<sup>3</sup> If the plaintiff in any case shows that without fault or blame on his part he was not able to discover the amount of his damages or the nature and character of suit to bring, the law will excuse such delay in bringing suit, and will not harshly hold that plaintiff has forfeited his damages, suffered and caused by the negligence of the defendant, and more especially will this be the case, when the facts show that the delay was caused by, or resulted from, the fault or neglect of the defendant.<sup>4</sup> The time of the limitation is to be reckoned, not from the day when the loss occurs, but from the day when the plaintiff learned the nature, character and amount of his loss.<sup>5</sup> If it be construed that the contract requires suit to be brought from the time when the loss occurred, and the plaintiff was not informed of the character and amount of loss at that time, and it was not the plaintiff's fault that he was not so informed, then such a clause would be but an instrument of fraud and would be unreasonable and void.<sup>6</sup>

But where it clearly appears from the evidence that the plaintiff presented his claim for damages in March, that he received the account of the sale of his cattle on the 12th day of April, by which he was as fully informed as to the extent of his damage as

<sup>1</sup> *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 602.

<sup>2</sup> *Missouri Pac. R. Co. v. Harris*, 67 Tex. 168; *Owen v. Louisville & N. R. Co.* 87 Ky. 626; *Baltimore & O. Exp. Co. v. Cooper*, 66 Miss. 558; *Bennett v. Northern Pac. Exp. Co.* 12 Or. 49; *Price v. Kansas Pac. R. Co.* 63 Mo. 314. See *Pacific Exp. Co. v. Darnell*, 62 Tex. 639; *Glenn v. Southern Exp. Co.* 86 Tenn. 594; *Capehart v. Seaboard & R. R. Co.* 81 N. C. 438; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *Place v. Union Exp. Co.* 2 Hilt. 19; *Southern Exp. Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118.

<sup>3</sup> *Galveston, H. & S. A. R. Co. v. Ball*, 80 Tex. 602.

<sup>4</sup> *Glenn v. Southern Exp. Co.* 86 Tenn. 594.

<sup>5</sup> *Ghormley v. Dinsmore*, 19 Jones & S. 196.

<sup>6</sup> *Longhurst v. Star Ins. Co.* 19 Iowa, 364.

he ever was afterwards, and his suit was not brought until the 21st day of June, and there is no pretense that any act of the defendant induced the delay, nor could there be such pretense in the face of the uncontroverted fact, that the plaintiff was informed by the defendant as early as the 1st day of May that his claim for damages would not be paid, and the contract required the suit to be brought within forty days, the evidence conclusively shows that plaintiff's cause of action was barred by the limitation agreed upon in the contract at the time the suit was brought.<sup>1</sup>

A condition in a contract of affreightment, that no claim for damages to, loss of, or detention of goods, shall be allowed unless notice in writing and particulars of the claim are given to the station freight agent at or nearest to the place of delivery, within thirty-six hours after the goods are delivered, applies to the place of delivery beyond the carrier's own line, but when applied to a carload of potatoes containing 400 bushels, is unreasonable and void as giving insufficient time for examination.<sup>2</sup> A promise by a station agent to waive a provision in a contract of shipment, requiring suit to be brought within forty days after the loss or damage occurs, will not excuse the shipper from bringing suit within that time, where he knows that the station agent has no authority from the company to adjust the claim without first obtaining consent.<sup>3</sup> A stipulation in a shipping contract, requiring the shipper to give written notice of his claim for damages does not apply to damages which accrued prior to the making of the contract.<sup>4</sup> Where a package was shipped from Clayton, Ind., to Savannah, Ga., during the war, when transportation was much interrupted, it was held that a condition that the carrier should not be liable for any loss, unless a claim therefor was presented within thirty days after the shipment at Clayton, was void.<sup>5</sup> A contract of shipment requir-

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89.

<sup>2</sup> *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Brown* (Tex. Civ. App.) 24 S. W. Rep. 918.

<sup>4</sup> *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) May 3, 1890; *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33.

<sup>5</sup> *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332.

ing not only that suits shall be commenced, but also that citations shall be served within forty days next after damage or loss occurs, is unreasonable and invalid.<sup>1</sup> A stipulation in a bill of lading which exempts the carrier from liability unless notice is given of the damage within a specified time, is within Ga. Code, § 2068, declaring that a common carrier cannot limit his legal liability by any notice given either by publication or by entry on receipts given or tickets sold, and is void unless expressly assented to by the shipper.<sup>2</sup> Section 958 of the Civil Code of Dakota reads as follows: "Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void." The first part of the section contains nothing new, and is substantially the common law doctrine, as pretty uniformly announced by the decisions of all the courts; but the latter clause, which declares unlawful every stipulation or condition in a contract, "which limits the time within which the party may enforce his rights," is perhaps against the great weight of modern authority. Under the statute, a provision in an express company's contract or receipt, exempting the company from liability unless a claim should be presented in writing within ninety days from that date is of no effect, where such contract or receipt was signed only by the company's agent.<sup>3</sup>

#### *a. Stipulation Regarding Notice to Consignee.*

Where by custom a delivery on the dock is held to be a delivery to the carrier, it should always be accompanied with notice.<sup>4</sup> The purchaser of a bill of lading is chargeable with facts to put him on inquiry, and hence with notice of the rights of one who, a memorandum on the face of the bill states, is to be notified of the arrival of the goods.<sup>5</sup> But it is not unlawful to stipulate, in

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Hume*, 6 Tex. Civ. App. 653.

<sup>2</sup> *Central R. & Bkg. Co. v. Hasselkus* (Ga.) April 24, 1893.

<sup>3</sup> *Hurtwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463. See "Notice of Claim for Damages."

<sup>4</sup> *Packard v. Getman*, 6 Cow. 757, 16 Am. Dec. 475.

<sup>5</sup> *Jacob Dold Packing Co. v. Ober & Sons Co.* 71 Md. 155.



a bill of lading which requires a ship to use reasonable care in discharging goods at a proper time and place, that no notice of discharge need be given to the consignee. A condition in a bill of lading by which the consignee agrees to be ready to receive his goods when the ship is ready to unload, that in default thereof the ship may land, warehouse, or place them in a lighter without notice, immediately, at his risk and expense, after the goods leave the deck of the ship, exempts the ship from the duty of giving him any notice, but not from the duty of exercising reasonable care to discharge them at a suitable place.<sup>1</sup> A stipulation in a bill of lading, that the carrier's responsibility as a common carrier shall terminate when the goods are transported and safely stored in the depot of the carrier, is not opposed to public policy, and operates to limit the liability thereafter to that of a warehouseman.<sup>2</sup> A direction in a bill of lading to notify certain persons, is notice that they are not consignees, and does not qualify the carrier's duty to deliver to the consignee.<sup>3</sup> A carrier, having notified the owner of goods that they have arrived and that he must pay the freight and receive them, must know whether they have in fact arrived or not, and is guilty of conversion if, upon demand after the goods have arrived, he tells the owner that they have not come, and fails to deliver them, although he does not in express words refuse to deliver them.<sup>4</sup> Where consignees of fruit, by a bill of lading which bound them to receive it from the ship's side, are aware that a discharge is to be made on a certain day, but make no attempt to remove the fruit from the wharf or provide for its care, but allow it to remain on the wharf over night, under a shed, they take all the risk of so leaving it.<sup>5</sup> Under Tex. Rev. Stat. arts. 281, 282, the liability of the carrier of freight, as such, continues until the thing carried is actually delivered to the owner or consignee, unless due diligence has been used to give notice to such persons of the arrival at destination.<sup>6</sup>

<sup>1</sup> *Rolfe v. The Boskenna Bay*, 6 L. R. A. 172, 40 Fed. Rep. 91.

<sup>2</sup> *Western R. Co. v. Little*, 86 Ala. 159.

<sup>3</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. ed. 287.

<sup>4</sup> *Louisville & N. R. Co. v. Lawson*, 11 Ky. L. Rep. 38.

<sup>5</sup> *Bonanno v. The Boskenna Bay*, 36 Fed. Rep. 697.

<sup>6</sup> *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175.

## CHAPTER VIII.

### TRANSPORTATION OF CATTLE.

- § 58. *Duty to Furnish Suitable Cars.*
- § 59. *Acceptance of Car by Shipper.*
- § 60. *Duty to Provide Place to Receive and Deliver Stock.*
  - a. *Texas Fever.*
- § 61. *Carrier Must not Discriminate between Shippers.*
- § 62. *Duty to Feed, Water and Care for Stock.*
- § 63. *Extraordinary Unloading of Livestock in Transitu.*
- § 64. *Carrier's Responsibility for Livestock.*
- § 65. *Forwarding by Connecting Line.*
- § 66. *Damages for Refusal or for Failure to Transport.*
- § 67. *Delay in Shipment and Delivery of Livestock.*
  - a. *Breach of Contract for Cars.*
  - b. *Damages to Livestock by Delay in Transportation.*
  - c. *Opinion of Expert Witnesses as to Damages.*
- § 68. *Damages for Negligent Loss of or Injury to Cattle.*
- § 69. *Liability for Miscarriage and Wrongful Delivery of Livestock.*
- § 70. *Stipulation for Notice of Injury to Livestock.*
  - a. *Limit of Time for Notice.*
  - b. *Forbidding Removal before Notice.*
- § 71. *Restricting Liability for Livestock.*
- § 72. *Contributory Negligence of Shipper.*

§ 58. *Duty to Furnish Suitable Cars.* See also, § 4.

A railroad company engaged in the business of transporting livestock is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business.<sup>1</sup> It is its duty to exercise care, skill, and diligence to furnish safe cars and appliances to those for

<sup>1</sup> *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67; *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

whom it undertakes to transport property.<sup>1</sup> But, it is said, it is not bound to provide cars strong enough to withstand vicious animals.<sup>2</sup> A railroad company in the carriage of livestock is not required to use the safest and best motive power, with the best appliances in use, but is only required to use such cars and motive power and appliances as are suitable, safe and sufficient.<sup>3</sup>

A shipper is not entitled to have his cattle carried in cars of a special construction of his selection, belonging to a third party and superior to ordinary cattle cars, by reason of the fact that the carrier transports some cattle in other cars, available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road,—that of carrying coal,—when not in use for cattle. The refusal to use the cars desired by the shipper does not constitute unjust discrimination.<sup>4</sup> A statute requiring railroad companies to furnish double decked cars for carrying sheep, when requested, and providing a penalty for refusal, although held by the state court constitutional as a proper regulation of common carriers,<sup>5</sup> is declared to be void as an attempt to regulate commerce.<sup>6</sup> The presumption in favor of the ability of a carrier to furnish cars for the shipment of stock as promised, can only be overcome by the evidence of some person having knowledge of the general resources of the company at the time in question; and testimony of persons not shown to have any special knowledge on that point is inadmissible.<sup>7</sup> A carrier sued for damages caused by furnishing for the shipment of cattle a car infected with the germs of Texas fever cannot escape liability on the ground that the bill of lading was not signed by its agent, where the contract of ship-

<sup>1</sup> *Hoosier Stone Co. v. Louisville, N. A. & C. R. Co.* 131 Ind. 575; *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>2</sup> *Selby v. Wilmington & W. R. Co.* 113 N. C. 588.

<sup>3</sup> *Illinois Cent. R. Co. v. Haynes*, 63 Miss. 485.

<sup>4</sup> *Re Morris*, 2 Inters. Com. Rep. 617.

<sup>5</sup> *Emerson v. St. Louis & H. R. Co.* 111 Mo. 161.

<sup>6</sup> *Stanley v. Wabash, St. L. & P. R. Co.* 3 Inters. Com. Rep. 176.

<sup>7</sup> *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

ment contemplated that it was to carry the cattle a greater part of the distance, and it not only furnished the car, but fixed the rate of compensation for the entire route.<sup>1</sup> The rule requiring a shipper to clean and repair cars furnished on a side track is unreasonable.<sup>2</sup>

The utmost that can be required of a vessel contracting to carry livestock, with regard to ventilation, is that it shall be such as is usual and as experience has demonstrated to be sufficient. A ship cannot be held at fault for not providing unusually wide spaces for cattle contracted to be carried, where she is obliged to have the fittings ready in anticipation of the arrival of the cattle, and no notice is given her agent that such spaces will be required, and the shipper, on examining the ship and fittings before the cattle go aboard, expresses no dissatisfaction.<sup>3</sup> A steamship is liable for cattle carried upon its deck, which are forced overboard without reasonable or apparent necessity, and solely from mere apprehension of danger.<sup>4</sup>

The penalty of \$25 per day imposed by Sayles's Tex. Civ. Stat. art. 4227a, § 3, is the only penalty prescribed for refusal by a railroad company to furnish a car on demand.<sup>5</sup> But damages may be recovered for the breach of a verbal contract to furnish cars for the transportation of cattle at a specified time, as it is not an action for the penalty prescribed by Sayles's Tex. Civ. Stat. art. 4227a, for a failure to supply cars on written application.<sup>6</sup>

Notwithstanding a special contract limiting its liability, a carrier may be held liable under the finding of a jury, where a wheel in the car in which the cattle were being transported, took fire, and the shipper requested that the car should be changed; but this being refused, upon the fire being extinguished, the transportation was continued and the fire breaking out again, the

<sup>1</sup> *St. Louis, I. M. & S. R. Co. v. Henderson*, 57 Ark. 402.

<sup>2</sup> *Hazel Mill. Co. v. St. Louis, A. & T. H. R. Co.* 6 Inters. Com. Rep. 701.

<sup>3</sup> *The Mondego*, 56 Fed. Rep. 268.

<sup>4</sup> *The Hugo*, 57 Fed. Rep. 403.

<sup>5</sup> *San Antonio & N. P. R. Co. v. Bailey* (Tex. App.) March 19, 1890.

<sup>6</sup> *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) May 3, 1890.

wheel broke and the animals were injured.<sup>1</sup> Where a wheel of a car, broken on a track, was in good repair, and no flaw could be detected, and there was no evidence of negligence—except the breaking of the wheel—a direction by the court to return a verdict for the defendant was sustained on appeal.<sup>2</sup>

### § 59. *Acceptance of Car by Shipper.*

The carrier is bound to furnish suitable, safe, and properly constructed cars in which to transport livestock,—suitable in reference to the kind and value of stock carried. It is said that the carrier cannot escape this obligation by calling attention to the defective condition of the car at the time the stock is received on board. The rule that a common carrier may not by contract exempt himself from the consequences of his negligence applies to an attempt by a common carrier to shoulder off upon a shipper, by a contract, the results of the carelessness of the carrier in furnishing unsuitable cars.<sup>3</sup> If the shipper has not by contract assumed the risk of the car, he is entitled to recover, if the jury should find that the carrier's negligence in failing to furnish a suitable car was the primary cause of the injury, although but for the nature and propensities of the animal carried, no loss would have resulted.<sup>4</sup>

It has been held in a later case than the one last cited from Massachusetts, by the court of that state, that a trial court erred in telling the jury that if they did not find any "distinct agreement," the plaintiff was entitled to a verdict, if negligence in fur-

<sup>1</sup> *Austin v. Manchester, S. & L. R. Co.* 16 Q. B. 600.

<sup>2</sup> *Morrison v. Phillips & C. Const. Co.* 44 Wis. 405, 28 Am. Rep. 599.

<sup>3</sup> *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490.

<sup>4</sup> *Evans v. Fitchburg R. Co.* 111 Mass. 142, 15 Am. Rep. 19; *Indianapolis & St. L. R. Co. v. Jurey*, 8 Ill. App. 160; *Illinois Cent. R. Co. v. Brelsford*, 13 Ill. App. 251; *Maslin v. Baltimore & O. R. Co.* 14 W. Va. 180, 35 Am. Rep. 748; *Powell v. Pennsylvania R. Co.* 32 Pa. 414, 75 Am. Dec. 564; *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill. 504; *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504; *Welsh v. Pittsburg, Ft. W. & C. R. Co.* 10 Ohio St. 65, 75 Am. Dec. 490; *Great Western R. Co. v. Hawkins*, 18 Mich. 427; *Hawkins v. Great Western R. Co.* 17 Mich. 57, 97 Am. Dec. 179; *Clarke v. Rochester & S. R. Co.* 14 N. Y. 570, 67 Am. Dec. 205; *Smith v. New Haven & N. R. Co.* 12 Allen, 531, 90 Am. Dec. 166; *Rhodes v. Louisville & N. R. Co.* 9 Bush, 688; *Pratt v. Ogdensburg & L. C. R. Co.* 102 Mass. 557.

nishing an unsuitable car "was the primary cause of the injury, although but for the nature and propensities of the animal carried, no loss would have resulted."<sup>1</sup> A stipulation in a printed livestock transportation contract, that the shipper has examined the cars provided for the transportation and found them in good order, and accepts them and agrees that they are suitable and sufficient, will not estop him from setting up that they were not safe or in repair.<sup>2</sup> A railroad company which has accepted animals for transportation, selecting cars for such purpose, cannot escape responsibility for its negligence in furnishing a car with the slats at the side too far apart, upon the ground that the consignor should have noticed the defect and rejected the car.<sup>3</sup>

An agreement by a shipper of livestock whereby he assumed all risk of injury to the animals "in consequence of heat or suffocation, or other ill effects of being crowded in the cars," does not relieve a railroad company from liability for injury in consequence of insufficient ventilation in the car furnished and used.<sup>4</sup> The fact that the shipper of livestock procured the agent of the railway company with which the transportation contract was made to get for his use a "palace horse car" owned by an independent company, which was paid for by the shipper, and which, after being loaded with his stock, was put in the train of the contracting company, will not relieve the latter from liability for injuries to the stock caused by a defect in the car, since a carrier cannot escape liability by carrying its freight in cars furnished or owned by another carrier.<sup>5</sup> It is the duty of the carrier to furnish suitable vehicles for transportation, and if he furnishes unfit or unsafe vehicles, he is not exempt from liability from the fact that the shipper knew them to be defective and used them.<sup>6</sup>

Where through a defect in a truck, cattle becoming alarmed, broke out and were injured, it was held that there was no implied

<sup>1</sup> *Evans v. Fitchburg R. Co.* 111 Mass. 142, 15 Am. Rep. 19.

<sup>2</sup> *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177.

<sup>3</sup> *Union Pac. R. Co. v. Rainey* 19 Colo. 235.

<sup>4</sup> *Kansas City, M. & B. R. Co. v. Holland*, 68 Miss. 351.

<sup>5</sup> *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177.

<sup>6</sup> *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827.

stipulation that the truck should be fit for the conveyance of cattle, where the agreement which the shipper signed, stipulated that the owner undertook all risks of conveyance, and the company was not liable for any injury or damage, however caused, and occurring to livestock of any description. In this case the shipper saw the truck when the cattle were put into it.<sup>1</sup> But it has been ruled that a clause in a bill of lading of cattle shipped upon a vessel by which the shipper assumes all risk of the fittings, is void as against public policy, in so far as it relates to a defective condition of the fittings through insufficient fastening due to the negligence of the employes of the vessel, and unknown to the shipper at the time of sailing.<sup>2</sup> And a stipulation in a printed live stock transportation contract, that the shipper has examined the cars provided for the transportation and found them in good order, and accepts them and agrees that they are suitable and sufficient, will not estop him from setting up that they were not safe or in repair.<sup>3</sup> If, however, the defect relates to the commodiousness of the car, and the possible effect of larger accommodations upon the particular animal to be carried, and the question is discussed between the shipper and the carrier, who informs him that a more commodious car will be furnished if the shipper is willing to pay a larger rate of freight (such larger rate not being unreasonable) and the shipper decides to take the cheaper car, himself attempting to guard against the want of room, it is a matter for careful consideration and examination. Under such a state of facts a charge unduly limited the field of inquiry, which instructed the jury, that mere suspicion, without notice to the shipper's agent, "that the car offered for the transportation of the animals was not suitable for the purpose, and the mere use of the car after efforts on his part to guard against the defects in the car by padding the head of one of the horses and the cross pieces, did not exempt the defendant from liability for loss caused while the animals were in the course of transportation by the defendant's negligence in furnishing such defective car, without proof of a distinct agree-

<sup>1</sup> *Chippendale v. Lancaster & Y. R. Co.* 21 L. J. Q. B. N. S. 22.

<sup>2</sup> *The Iowa*, 60 Fed. Rep. 561.

<sup>3</sup> *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177.

ment on the part of the agent of the plaintiff, to assume the risk arising from the defects of the car." In the case where this charge was given, the preamble that mere suspicion, without notice to the plaintiff's agent, that the car was not suitable, etc., it was thought by the appellate court, was not adapted to the facts of the case, and might easily mislead the jury. It was not, as developed by the trial, a case of mere suspicion without notice. The plaintiff's agent knew that the car in which it was proposed to ship the animals was an ordinary box freight car. The finding states that it appeared in evidence that the agent, before shipping the animals, saw the car which was used, and knew of the alleged defects in its construction, namely, of the alleged fact that the roof and rafters of the car were so low that a horse on lifting its head was liable to strike the same, and that the car was without stalls or partitions in the inside, and the agent caused precautions to be taken for their protection by padding the rafters of the car, and placing a stuffed hood upon the mare, and by constructing a pen for the colt. Instead of a case of mere suspicion, therefore, it was a matter of actual knowledge of the existence of the very defects which were claimed to constitute the defendant's negligence, and an attempt by the plaintiff's agent to guard against them. Then, again, it appeared in evidence that the agent was informed that the defendant had two special horse cars, which were provided with passenger car springs and buffers, and which had padded stalls and arched rafters, and that the animals could be shipped in one of those cars at the same rate and upon the same terms as by the box freight car, upon payment of the additional sum of 10 cents per mile for the use of such special car. In other words, according to the defendant's claim, the plaintiff tendered a mare and colt, which he stated were worth \$100, for transportation, and before the animals were shipped, he saw the box car in which they were subsequently shipped; knew of its alleged defects; was informed that the defendant had special horse cars, free from the alleged defects, in which the animals could be shipped for an additional charge; did not avail himself of the special car, but attempted to remedy the defects of the box car, and the animals were sent in it without his objection. Now,



had not the jury a right to find, from these facts alone, that the agent of the plaintiff, assumed the risk arising from those defects of the car? It was not necessary to prove that he expressly said: "I see that the car is low from floor to roof, and I hear your offer of better accommodations for a higher price, but decline it, and will myself assume the risk arising from such defects of the box car;" nor words of like import. His acts, viewed in the light of the surrounding circumstances, might evidence his assumption of the risk as clearly as his distinct agreement so to do. The defendant was bound to furnish a suitable car for the transportation of horses. It was still the duty of the jury to inquire whether it did so. If the box car was unsuitable for the transportation of ordinary horses of the value placed by the plaintiff's agent on these, then the defendant might be liable though it informed the plaintiff of its better accommodations for a higher price. But if the jury found that the box car was suitable for the ordinary business of transporting horses, though lower between joists than the special cars furnished at a higher price; that the plaintiff was aware of such defects, and was informed about such special cars, and the additional price charged for them was not unreasonable; and that, thereupon, he attempted to guard against the possible effect of the lower space, and acquiesced in the use of the car which was used,—then it was competent for them to further find, from such facts alone, that the plaintiff assumed the risks incident to the defect in question. Under these existing facts the defendant was entitled to a charge to that effect, and the instructions given were too restrictive in this particular.<sup>1</sup>

A railroad company is not liable for injuries caused by negligence in loading livestock drawn over its road in a car owned and loaded by the owner of the stock, though it is the general duty of its conductors to see that trains under their control are properly loaded.<sup>2</sup> Where there is a provision that the shipper load and unload, carrier's servants to be subject to the order of the shipper, it is the duty of the shipper to secure the doors, and of carrier to allow time therefor.<sup>3</sup>

<sup>1</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>2</sup> *Fordyce v. McFlynn*, 56 Ark. 424.

<sup>3</sup> *Newby v. Chicago, R. I. & P. R. Co.* 19 Mo. App. 391.

### § 60. *Duty to Provide Place to Receive and Deliver Stock.*

A railroad company as a carrier of livestock is obliged to provide necessary means and facilities for receiving livestock offered it for shipment, and for its delivery to the consignee, and cannot without special contract require compensation from the shipper or consignee for providing such means and facilities, in addition to the charges for transportation. When a railroad company does not provide suitable facilities for the delivery of livestock contracted to be carried by it, it may be compelled to deliver through facilities furnished by the consignee.<sup>1</sup> A railroad company contracting to deliver to a particular stock yard, all the livestock coming over its line to a certain point, enters into an illegal contract. It is its duty to transport over its road and deliver to all stock yards reached by its tracks or connections, all livestock consigned upon the same terms, and in the same manner as under like conditions, it transports and delivers to their competitors. This duty may be enforced by injunctions.<sup>2</sup> The legal duty of carriers is not fully discharged by receiving on, and discharging from their cars livestock at a depot, access to which must be purchased.<sup>3</sup> Railroad companies cannot absolve themselves from liability under their statutory duty to keep suitable pens for the shipment of cattle, by showing that they were so badly kept or constructed as to make it contributory negligence upon the part of the shipper to use them.

Cattle are to be considered as having been received by the carrier for shipment and held by it as a common carrier, where they have been placed in a pen by direction of the carrier's agent, and the work of putting them on the cars has begun,<sup>4</sup> and a carrier cannot avoid liability for failure to provide suitable pens for stock, simply because the shipper was looking after his stock and saw the pens.<sup>5</sup> A railroad company, by consent to the

<sup>1</sup> *Corington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73.

<sup>2</sup> *McCoy v. Cincinnati, I. St. L. & C. R. Co.* 13 Fed. Rep. 3.

<sup>3</sup> *Keith v. Kentucky Cent. R. Co.* (Ky.) 1 Inters. Com. Rep. 601.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270.

<sup>5</sup> *Mason v. Missouri Pac. R. Co.* 25 Mo. App. 473.

use of ground in loading cars by several persons, impliedly invites others having occasion to load cars at that place, to use the ground for that purpose. It is liable for injury to a horse from stepping into a hole left by it at a place which it has expressly or impliedly invited persons to use in loading cars, although the loading might have been done more speedily by other means than the use of horses, where their use is reasonably well adapted to the work.<sup>1</sup> If, under any circumstances, a carrier can be excused from liability for injuries to a horse by reason of a defect in a platform from which it is loading the horse upon a car, it cannot be excused in the absence of full diligence to discover the defect before exposing the horse to the risk of injury.<sup>2</sup>

A railroad company is guilty of negligence rendering it liable to a shipper of cattle accompanying them in their transportation, in failing to plank and provide proper guard rails upon a bridge constituting part of its station grounds, upon which such shippers will have occasion to go in looking after their stock, in consequence of which omission such shipper falls off the bridge and is injured.<sup>3</sup> It is the duty of a carrier of stock by railroad to provide a safe mode of delivery, by having a platform suitable for the purpose of unloading stock.<sup>4</sup>

#### a. "*Texas Fever.*"

In several of the states, statutes are in force, prohibiting any person from bringing into such states, cattle in such a condition as to communicate Texas fever to other cattle, under severe penalties, both civil and criminal. These statutes relieve the common carrier from the duty, as to animals thus conditioned, otherwise imposed upon it as to cattle in general, of accepting them for transportation. In several instances attempts have been made to hold the carrier liable for damages resulting from the transportation by it of such cattle. But the courts have uniformly permitted the carrier to defend, on the ground that it acted in

<sup>1</sup> *Chicago & I. Coal R. Co. v. De Baum*, 2 Ind. App. 281.

<sup>2</sup> *East Tennessee, V. & G. R. Co. v. Herrman*, 92 Ga. 384.

<sup>3</sup> *Illinois Cent. R. Co. v. Foley*, 53 Fed. Rep. 459.

<sup>4</sup> *Owen v. Louisville & N. R. Co.* 87 Ky. 626.

ignorance of the condition of the animal carried, and that such condition could not have been discovered by the exercise of proper care and caution.<sup>1</sup>

§ 61. *Carrier Must not Discriminate between Shippers.*

Carriers cannot make the yards of a certain company their exclusive stock depot at a certain place, there being other stock yards near by charging lower rates.<sup>2</sup> A firm of cattle dealers in the city of New York, who procure their cattle on a large scale from Chicago and other western points for domestic consumption, as well as for export, made an arrangement with two interstate rail carriers, constituting a through line from Chicago to New York, that the said firm will, under the name of an express company of their own creation, furnish not less than 200 or more than 400 improved livestock cars for the transportation of these cattle. For the rental of these improved stock cars the carriers pay this express company three fourths of a cent per mile, whether loaded or empty. Extraordinary facilities and rights of way are given these cars to enable them to make a large mileage, and they make more than twice the mileage of ordinary stock cars. Besides this, the carriers pay 50 cents for the loading of each of said cars with cattle at the Union Stock Yards, in Chicago, for which no charge is made against the express company or the firm represented by it. In addition to this the carriers pay this firm yardage at the rate of  $3\frac{1}{2}$  cents per hundred pounds on all their cattle, and upon all other cattle hauled for other firms in the care of this firm, owning the express company, to its yard at pier 45, East River. This yardage charge is thus paid to the said firm by the said carriers for keeping their cattle in the firm's own yards after delivery of them to the firm, and then this yardage charge is deducted from the tariff rate charged by the carrier. The amount of these rebates to this firm in rates on these cattle by

<sup>1</sup> *Furley v. Chicago, M. & St. P. R. Co.* (Iowa) 23 L. R. A. 73; *Patee v. Adams*, 37 Kan. 133; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550.

<sup>2</sup> *Keith v. Kentucky Cent. R. Co.* 1 Inters. Com. Rep. 601; *McCoy v. Cincinnati, L., St. L. & C. R. Co.* 13 Fed. Rep. 31.

these carriers more than pays the entire cost of the improved stock cars within two years after operations are commenced with them, including the expenses of operation, leaving said firm owning the cars and still operating them with all these advantages in rates and facilities. It was ruled by the Interstate Commerce Commission that this is an unlawful preference to the firm owning these improved stock cars and a violation of the Act to Regulate Commerce, and that it was an unlawful and unjust prejudice to other cattle firms and dealers in New York who are competitors in the business of said firm owning said improved stock cars.<sup>1</sup>

### § 62. *Duty to Feed, Water and Care for Stock.*

The carrier, among his other duties, is primarily bound to provide food and water, a place for sleeping, and, if necessary, a place for exercise.<sup>2</sup> But he may transfer such duty to the owner by express contract.<sup>3</sup> He may even then become liable for failure to furnish proper facilities to the consignor for such purposes.<sup>4</sup> Proper attention must be given to the food, water and ventilation of livestock, unless that duty has been assumed by the owner under contract with the carrier.<sup>5</sup> If the carrier intrusted with a living animal of any description for transportation should suffer it to die from starvation or thirst, or for the want of ordinary care and attention in any respect which it required, he would be

<sup>1</sup> *Shamberg v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 502.

<sup>2</sup> *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434; *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268; *Harris v. Northern Indiana R. Co.* 20 N. Y. 232; *Crugin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Taff Vale R. Co. v. Giles*, 23 L. J. Q. B. 43; *Great Northern R. Co. v. Scaffield*, L. R. 9 Exch. 132.

<sup>3</sup> *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Heineman v. Grand Trunk R. Co.* 31 How. Pr. 430; *Crugin v. New York Cent. R. Co.* *supra*.

<sup>4</sup> *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177.

<sup>5</sup> *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393; *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 665; *Gulf, C. & S. F. R. Co. v. Wilhelm* (Tex. App.) April 29, 1891; *Crugin v. New York Cent. R. Co.* *supra*; *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268; *Harris v. Northern Indiana R. Co.* 20 N. Y. 232; *Bryant v. Southwestern R. Co.* 68 Ga. 805; *Dawson v. St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Wood v. Chicago, M. & St. P. R. Co.* 68 Iowa, 491, 56 Am. Rep. 861.

liable, unless he should be relieved from the duty by contract with his employer.<sup>1</sup> A steamship is not justified in sailing without taking on board fodder provided for cattle carried by her under an agreement that she will supply conveyance for the necessary fodder, by a conversation with the drover in charge of the cattle, in which he states that there is fodder enough, and that the steamer should go on without waiting to take aboard the remainder,—especially where, after she hauls into the stream, she waits there a time long enough to bring the lighter having the fodder aboard alongside and unload, and the owners of the cattle demand that the remaining fodder be taken aboard and agree to pay the towage of the lighter.<sup>2</sup>

If a railroad company accepts hogs for transportation, which, from the crowded manner in which they are necessarily carried upon its cars, are liable to die from overheating, it is the duty of the agents of the road to apply water to them externally when it is found necessary to prevent such overheating, and if they fail to do so the company will be liable.<sup>3</sup> It is not relieved from the duty of exercising proper care and diligence in seeing to the needs of animals on its train, by reason of the rush of business.<sup>4</sup> A contract for the transportation of cattle upon a vessel implies that the space to be allotted them for the voyage shall be sufficiently ventilated, and a contract for the shipment of cattle upon a vessel, requiring the ship to insure, means that the number of cattle specified, if carried in the space allotted by the ship for their transportation, can be insured; and if insurance cannot be effected upon cattle placed in the space allotted, without additional ventilation, which the master refuses to provide, the shipper is justified in refusing to ship more than the number of cattle which can be insured, and may recover from the ship the damages sustained by reason of the nonshipment of the number of cat-

<sup>1</sup> *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578.

<sup>2</sup> *The Connemara* (D. C. S. D) 51 Fed. Rep. 304.

<sup>3</sup> *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434; *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393.

<sup>4</sup> *International & G. N. R. Co. v. Lewis* (Tex. Civ. App.) Oct. 4, 1893.

the shut out by the master's refusal to supply sufficient ventilators.<sup>1</sup> Contract that it shall not be liable for anything beyond its own line will not relieve it from liability for injuries resulting from a refusal to feed and water the stock at its terminus, although the injury does not appear until after delivery to a connecting line.<sup>2</sup>

A carrier has the duty to feed and water stock during transportation, and cannot transfer it to the shipper by a custom requiring him to go along on the same train with the stock to feed and water them at his own risk and expense.<sup>3</sup> In case of special contract whereby the owner agrees to and does take charge of the stock, the burden of proving negligence is on him.<sup>4</sup> The duties of carriers of live stock, and their responsibilities has been repeatedly stated by the courts.<sup>5</sup> A shipper of live stock may avail himself of a contract with a carrier to look after the stock, using due care and caution, without losing his status as a passenger, notwithstanding such contract does not relieve the carrier from its duty to look after the stock.<sup>6</sup> Consent by a shipper of cattle that they need not be fed and watered at a certain station does not estop him from setting up damages to them by an unusual delay of the carrier caused by its negligence in not making the customary time to the next feeding station.<sup>7</sup> Although the shipper undertakes the feeding and watering of stock, yet if the animals are carried beyond their destination and there detained for some time before they are returned, the carrier will be responsible for its failure to properly care for the stock, after the destination is passed.<sup>8</sup>

A carrier is liable for injuries to stock delivered it for transportation, arising from failure to furnish the proper facilities for

<sup>1</sup>*The Alvah*, (D. C. E. D. N. Y.) 59 Fed. Rep. 630.

<sup>2</sup>*Galveston, H. & S. A. R. Co. v. Ivey* (Tex. Civ. App.) Oct. 4, 1893.

<sup>3</sup>*Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127.

<sup>4</sup>*McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445; *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440; *Buddy v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 206.

<sup>5</sup>See notes to *International & G. N. R. Co. v. Tisdale* (Tex.) 4 L. R. A. 545; *Missouri Pac. R. Co. v. Fagan* (Tex.) 2 L. R. A. 75.

<sup>6</sup>*International & G. N. R. Co. v. Armstrong* (Tex. Civ. App.) Sept. 20, 1893.

<sup>7</sup>*St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625.

<sup>8</sup>*Bryant v. Southwestern R. Co.* 68 Ga. 805.

feeding and watering, though the shipper has agreed to accompany his stock and feed and water them at his own risk.<sup>1</sup> But a shipper of livestock by railway, under an agreement that he shall feed, water, and take care of the stock at his own expense in case of accidents or delays of time from any cause whatever, cannot recover damages resulting from his failure so to do, although unnecessary time is consumed in the transportation, and increased expense is made necessary thereby.<sup>2</sup> The fact that one of two trains carrying cattle was more than twenty-eight hours on the road without feeding or watering them, in violation of U. S. Rev. Stat. § 4386, will not make the company liable for damages to the cattle during shipment, where the shipper had a special contract binding him to take care of, feed and water them on the road, and there is nothing to show what part of the damage to them was caused by failure to feed and water them.<sup>3</sup> Under the statute prescribing a penalty to be recovered by the owner against a carrier who shall fail to sufficiently feed and water livestock during transportation and until delivery, in order to authorize a recovery of such penalty the statutory grounds must be particularly set forth and clearly established by proof.<sup>4</sup>

Tex. Rev. Stat. art. 284, imposing a penalty upon any carrier who shall fail to sufficiently feed and water livestock conveyed by it, unless otherwise provided by special contract, is a legitimate exercise of the state's police power, and not an illegal interference with the Interstate Commerce Act, even when applied to an interstate shipment. Neither is it invalid on the ground that it is vague, indefinite, and uncertain. And the statutory penalty for failure to sufficiently feed and water livestock conveyed by a common carrier, authorized by this statute, is not included in a contract for the shipment of cattle providing that suit for damages must be brought within forty days next after the damages shall occur.<sup>5</sup> A carrier of stock who is guilty of a breach of duty

<sup>1</sup> *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 29, 1891; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) April 29, 1891.

<sup>2</sup> *Bouz v. Central R. & Bkg. Co.* 87 Ga. 463.

<sup>3</sup> *Missouri Pac. R. Co. v. Texas & P. R. Co.* 41 Fed. Rep. 319.

<sup>4</sup> *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 4 L. R. A. 801.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Gray* (Tex. Civ. App.) Jan. 24, 1894.



in failing to feed and water the same at its terminus is liable for an injury to the stock caused thereby, although the damage does not appear until the stock are upon a connecting line, and the contract of shipment limits its liability to injury occurring on its own line.<sup>1</sup> Under a declaration in an action against a railroad company, which charges delay in a train in which horses are shipped, and also failure to furnish opportunity for feeding and watering them, the plaintiff is entitled to recover upon showing that defendant omitted to perform its duty in the latter respect, although it was not liable for the delay of the train.<sup>2</sup>

### § 63. *Extraordinary Unloading of Livestock in Transitu.*

A provision, in a contract for the transportation of cattle, that the shipper should load and unload them at his own risk, does not deprive the carrier of its just, rational and necessary discretion of determining when the exigencies of transportation require them to be unloaded.<sup>3</sup> Where the contract for the transportation of cattle placed the entire risk of the journey and the duty of loading and unloading upon the shipper, requiring the carrier only to furnish assistance, the train having been delayed by a snowstorm, the carrier is under no obligation to unload the cattle when the shipper had charge of them and might himself have unloaded them.<sup>4</sup> But a railroad company cannot make a valid contract exempting itself from liability by reason of its own negligence or the negligence of its employes in failing to furnish a shipper of stock opportunities for loading and unloading it for the purpose of feeding, watering, and taking care of it.<sup>5</sup> Where the transit of a consignment of livestock is delayed without justifiable excuse, the carrier is liable for damages resulting from a refusal to allow the shipper to unload and water the stock.<sup>6</sup>

<sup>1</sup> *Galveston, H. & S. A. R. Co. v. Herring* (Tex. Civ. App.) Jan. 10, 1894.

<sup>2</sup> *Smith v. Michigan Cent. R. Co.* (Mich.) April 17, 1894.

<sup>3</sup> *McAlister v. Chicago, R. I. & P. R. Co.* 74 Mo. 351.

<sup>4</sup> *Penn v. Buffalo & E. R. Co.* 49 N. Y. 204, 10 Am. Rep. 355.

<sup>5</sup> *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 485.

<sup>6</sup> *Harris v. Northern Indiana R. Co.* 20 N. Y. 232.

Notwithstanding a contract for transportation of livestock exempted the carrier from any liability for damages resulting from delay, it is the duty of the carrier, upon reasonable request of the shipper, after the train is stopped by a flood, to so place the cars as to be convenient to the usual and accessible means of unloading, if that is practicable, and failure to do so carries with it the liability for resultant damages. In such a case, if the conductor has no reason to believe that he can run the train through the high water, of which he has been warned, his refusal of the request of the shipper to have the cars placed so that the stock can be unloaded at a station, before the high water was reached, is negligence which renders the carrier liable for damages caused by the train being delayed at a point where the stock could not be unloaded.<sup>1</sup> The carrier's refusal to lay out at a way station a car loaded with cattle and hogs, upon the request of the shipper who discovers some of the cattle in a bad condition, on the ground that the stock pen at that station will not hold the hogs safely, is not justified where the cattle might have been unloaded into the pen and the hogs retained in the car,—especially if it was the carrier's duty to have a safe pen for hogs as well as for cattle at that station.<sup>2</sup>

Section 4386 of the United States Revised Statutes, prohibiting a carrier from transporting livestock in the same cars for more than twenty-eight consecutive hours without unloading, does not give the carrier the right to confine stock in cars for such time, whether it would be negligent or not so to do.<sup>3</sup> A carrier who violates such statute is liable, not only for the penalty prescribed thereby, but is negligent *per se* and liable for the damages resulting therefrom. The fact that the stock yards of the carrier at the regular station for unloading and feeding were on fire when the train passed is no excuse for not unloading the stock at some adjacent point.<sup>4</sup> Although by the contract for the transportation of livestock the shipper is to feed, water, and care for them while

<sup>1</sup> *Bills v. New York Cent. R. Co.* 84 N. Y. 5.

<sup>2</sup> *Johnson v. Alabama & V. R. Co.* 69 Miss. 191.

<sup>3</sup> *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444.

<sup>4</sup> *Nashville, C. & St. L. R. Co. v. Heggie*, 86 Ga. 210.

in transit, if they are detained to such an extent that it is necessary, in order to avoid injury, to unload, water and feed them, the carrier is liable for damages arising from its failure to provide the shipper with suitable facilities for so doing.<sup>1</sup> A railroad company which fails to comply with U. S. Rev. Stat. § 4386, imposing a penalty for keeping live stock in the cars more than twenty-eight consecutive hours, except in certain cases, is liable to the owner of the stock in damages, as well as to the penalty, where such keeping does not result from any of the exceptions mentioned.<sup>2</sup> A carrier undertaking to transport stock in cars which are not properly constructed for feeding and watering, is bound to furnish places where the stock may be unloaded, watered, and fed, without injury, in all kinds of weather, under Tex. Rev. Stat. art. 284, requiring carriers to feed and water livestock during transportation unless otherwise provided by special contract.<sup>3</sup>

The relative duty of carrier and shipper is discussed in an interesting case on appeal. Under a special contract under which the appellee seeks a recovery, the defendant corporation let to appellee an entire car, to be used by him in the transportation of what is denominated "emigrant movables," consisting, in this instance, of six horses and a lot of miscellaneous property,—corn, feed stuff, furniture, etc. The car was under the charge and in the care of appellee, was loaded by him at his own discretion, and was held in the defendant's yards at Chicago, to meet appellee's wishes, for about three days, in order to permit him to complete his load; and this while the horses were all on the car, they having been loaded at a point thirty miles north of Chicago. The contract stipulated, for the railroad company, against liability on its part, except for injuries resulting from collisions or derailment in transportation. The railroad did not limit its liability for willful injuries or gross negligence. By this special contract the appellee agreed to feed, water and take care of his stock, and to load and unload the animals, and to exempt the railroad company

<sup>1</sup> *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 29, 1891.

<sup>2</sup> *Hale v. Missouri Pac. R. Co.* 36 Neb. 266.

<sup>3</sup> *International & G. N. R. Co. v. McRae*, 82 Tex. 614.

from loss occurring by jumping from the cars, delay of trains, or any damage the stock might sustain, except such as should result from collisions or derailment of cars in course of transportation. Suitable provision was made for feeding and watering the stock on the car, and they were properly fed and watered by appellee, who accompanied the stock, without further charge than the price paid for the use of the car. After the stock had been loaded and kept confined in the car for nearly three days, the appellee completed his additional loading, and the car was taken in charge by appellant, to be transported on its route to Jackson, Miss. The next day after leaving Chicago appellee discovered that one of the young stallions was down in the car. He got it up, but before reaching Centralia and about a day after the journey had been begun, the same young animal was found down again and, as was thought by appellee, to be down finally, as he expresses it. On reaching Centralia appellee made application to the railroad company's agent to be laid out for twenty-four hours, to the end that he might rearrange his load (then plainly seen to have been improperly loaded) and to rest his stock, which application was not accepted and complied with, though the car of appellee was actually taken out of the train in which it was being carried, and was permitted to lie at Centralia for a few hours,—a time too short, however, as appellee thought, to afford him opportunity to unload, rest his stock and rearrange the load.

The question, then, considered by the court is, Had the appellee the right to demand that he be laid out at Centralia? If he had this right, how was it acquired? Was it an implied obligation resting upon the railroad? If it finds rest under the contract, it will be found by implication. There is no express obligation of this character appearing on the face of the instrument. If it was an implied obligation on the railroad, how is the implication raised? If it was the custom of the railroad company to lay out cars in which a few horses were carried, then there was an implied obligation assumed to comply with such custom on the part of the railroad. But the undisputed evidence perfectly shows that, while it was the custom to lay out carload lots of animals every twenty-four or twenty-eight hours, in order

that they might be fed, watered, and cared for, no such custom prevailed or existed in cases where a few animals only were loaded in a car, and where provision was made thereon for watering and feeding the animals. The custom was unknown in cases of the latter character. Nor does the absence of the custom seem unnatural, there being no necessity, apparently, in ordinary cases, for any unloading. The cases of *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85, and *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434,—raised an implied obligation on the carrier to throw water on hogs crowded in a car, because of the known custom of railroads to so apply water to that particular animal. In the case of *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 665, the railroad company received a carload of hogs from plaintiff, and, after loading and starting them on their journey, there was such delay, by reason of the wrecking of another train, that a number of the hogs died; and the court held, as it was a natural propensity of hogs to struggle to get near to or away from the doors of a car, when it is left standing, and to “pile up” on each other in such struggles, and thereby produce injury or death, and as it appeared that the injuries complained of were attributable to the failure of the railroad company to give the animals any attention during the twelve hours during which the train was standing still because of the obstructing wreck, that the company was liable because of its negligence, in this extraordinary danger to the animals, in failing to do what the delay and consequent peril to the animals required should be done. In *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 243, 93 Am. Dec. 162, it was held that the court erred in charging as matter of law, that if the plaintiff’s agent informed the conductor that the mare was acting badly and in danger of being killed if carried further, and asked him to switch off the car, the conductor was bound to switch off, if it could reasonably have been done; and in *Bills v. New York Cent. R. Co.* 84 N. Y. 5, it was said that if the plaintiff by his agent observed that the animals were not being safely transported, and requested that the car which had no freight, and the use of which had been prepaid, be set out on the side track, so that he could resume pos-

session of the animals, and if it could reasonably have been done, and this request was refused, such conduct of the carrier was grossly negligent. But there is no support in any of these cases for the proposition that there was an implied obligation in this case upon the railroad company to lay out the car, which appellee had hired, for twenty-four hours at Centralia. The contrary is involved in these decisions.

In the absence of any custom imposing obligation to lay out on the request of the appellee, what is there in the conduct of the parties to the contract which will authorize the conclusion that any purpose to lay out the car, after it had been started on its way to its destination, was in the minds of the company and the appellee? What is the foundation for implying that the minds of the parties ever dwelt upon or met in any unexpressed agreement that appellee should have such right? There appears no circumstance, even, which tends to support that proposition. On the other hand, there is much in the evidence of the appellee which strongly shows that he regarded the use of the car as confined to one continuous trip. He placed three horses in each end of the car, and then partitioned both ends in front of the horses, their heads being towards the middle doors of the car. He likewise made stalls for the horses, respectively, within the partitioned spaces, and then he proceeded to fill up the vacant space in the middle of the car with a large quantity of corn and other feed stuff, household goods, etc. The whole arrangement of the carload, as made by the appellee, precluded the unloading of the car, unless with much labor and considerable time. It is perfectly apparent that neither when the contract was executed nor when the car was loaded was there any thought of having a lay-out accorded him while on the way, in the mind of appellee himself even. There is no ground for maintaining that there was any implied obligation, under the contract, to give appellee the desired lay-out.

It is said that by section 4386, U. S. Rev. Stat., a definite rule for the transportation of animals is created, and penalties prescribed for disregard of the rule. With this rule and its enforcement the courts of the state are no way concerned. But the Act

itself, in a subsequent section, provides for the recovery of the penalty in a civil action in the proper Federal court. Is there an obligation, founded in common humanity, which required the railroad company to lay out appellee's car, in order that dumb brutes may have relief from suffering and rescue from death? The evidence proves that the appellee did not himself think the stock in the condition indicated in the foregoing question when he made his request at Centralia to be laid out. Surely it cannot be believed that, if he then knew, or had reason to know, that very valuable stallions (one of which he had paid \$800 for) and valuable mares were in peril of impending death or serious injury, self-interest as well as humanity, would not have constrained him to make a new contract for longer use of his car, or, if necessary, to abandon altogether his then contract with the railroad company, and take the chances of the trifling loss of \$60, which he had bound himself to pay the railroad, by then and there unloading his car and leaving the train. It is manifest that by keeping his stock on the car for three days before starting them southward from Chicago, and by so loading the car as to render it impossible to take the stock out without great trouble and delay, the appellee had placed himself in the unfortunate situation which confronted him at Centralia, and from which he could only extricate himself by making a new contract for the use of the car for a longer time than originally thought needful, or by abandoning his contract altogether, and removing his stock from the train.<sup>1</sup>

#### § 64. *Carrier's Responsibility for Livestock.*

The joint committee on railroad transportation, appointed by the railroads of the United States, have adopted, taking effect January 1, 1895, the following:

Property shipped not subject to Uniform Bill of Lading Conditions, will be charged twenty (20) per cent higher than as herein provided (subject to a minimum increase of one (1) cent per 100 lbs.) and cost of Marine Insurance. (See Rule 1, Appendix Uniform Bill of Lading.)

----- Station ----- 189 -----

THIS AGREEMENT, made this ----- day of -----, 189-----, by and be-

<sup>1</sup> *Illinois Cent. R. Co. v. Petersen*, 14 L. R. A. 550, 68 Miss. 454.

tween the ----- Company, hereinafter called the carrier, and -----  
(*Shipper's name*) ----- hereinafter called the shipper:

WITNESSETH, That the said shipper has delivered to the said carrier Live Stock of the kind and number, and consigned and destined by said shipper as follows:

CONSIGNEE, DESTINATION, ETC.	NUMBER AND DESCRIPTION OF STOCK. (Shipper's Load and Count.)	WEIGHT. SUBJECT TO CORRECTION.
Advance Charges, \$-----		
Car Nos. and Initials.-----		

for transportation from ----- to destination, if on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE ADMITTED AND ACCEPTED BY THE SAID SHIPPER AS JUST AND REASONABLE, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of ----- per ----- which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise:

If Horses or Mules—not exceeding one hundred dollars each.

If Cattle or Cows—not exceeding seventy-five dollars each.

If Fat Hogs or Fat Calves—not exceeding fifteen dollars each.

If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals—not exceeding five dollars each.

And in no event shall the carrier's liability exceed twelve hundred dollars upon any carload.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier, nor any connecting carrier, is to be under any liability or duty with reference thereto, except in the actual transportation of the same.



That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from the said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock, occasioned by any or either of the following causes, to wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control.

That in the event of any unusual delay or detention of said livestock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the ..... (*Railroad Agent's title*) ..... Agent of the said carrier, at his office in ..... (*Agent's address*) ..... within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platform, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the livestock in

charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employees, or otherwise.

And ..... (*Shipper's name*) ..... do .... (*does or do*) .... hereby acknowledge that ..... (*he or they*) ..... had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but ha... (*has or have*) .. voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

The ..... Company,

By .....  
[Station Agent.]

Witness my hand.....  
[Shipper.]

By .....  
[Shipper's Agent.]

.....  
.....  
[Witness.]

#### CONTRACT WITH MAN OR MEN IN CHARGE.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock... (*I am or we are*) .. in charge, the undersigned do... (*does or do*)... hereby voluntarily assume all risk of accidents or damage to... (*his or their*)... person and property and do... (*does or do*)... hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers or any of its or their employees or otherwise.

..... } [*Signature*  
..... } *of Man*  
..... } *in Charge.*]

.....  
.....  
[Witness.]

The duties and responsibilities of railway companies as shippers of live animals are precisely those of a common carrier with respect to other property committed to its care for transportation, except that they are not insurers against losses and injuries resulting from the inherent nature, propensities, or habits of the animals themselves.<sup>1</sup> A carrier of livestock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God.<sup>2</sup> It is not an insurer of livestock, but must provide suitable means for its conveyance, and use all reasonable diligence and forethought in the varying circumstances arising in the business.<sup>3</sup> They incur the responsibilities of common carriers as to such freight; but, at the same time, where an injury has happened to them it is competent for the carrier to show that it occurred through the "proper vice" of the animal, and not from any negligence on his part.<sup>4</sup> As insurers they are not liable for accidents happening through the inherent vice of the thing insured, but only for such as happen through adventitious causes.<sup>5</sup> While common carriers are insurers of inanimate goods against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance and care.<sup>6</sup> In the transportation of livestock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. In all such cases, the

<sup>1</sup> *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Atlantic & P. R. Co. v. Laird*, 58 Fed. Rep. 760.

<sup>2</sup> *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; *St. Louis & S. F. R. Co. v. Clark*, 48 Kan. 321.

<sup>3</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>4</sup> *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

<sup>5</sup> *Rohl v. Parr*, 1 Esp. 445; *Hunter v. Potts*, 4 Campb. 203; *Boyd v. Dubois*, 3 Campb. 133; *Kendall v. London & S. W. R. Co.* L. R. 7 Exch. 373.

<sup>6</sup> *Penn. v. Buffalo & E. R. Co.* 49 N. Y. 204, 10 Am. Rep. 355; *Clarke v. Rochester & S. R. Co.* 14 N. Y. 570, 67 Am. Dec. 205; *Michigan S. & N. I. R. Co. v. McDonough*, *supra*; *Blissell v. New York Cent. R. Co.* 25 N. Y. 442, 32 Am. Dec. 369; *Smith v. New Haven & N. R. Co.* 12 Allen, 531, 90 Am. Dec. 166.

carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires.<sup>1</sup>

A carrier is not liable for an injury inflicted by a live animal upon himself during transportation, or by other animals properly shipped in the same car, without fault on the part of the carrier.<sup>2</sup> Where the carrier has provided proper cars, food, water, and the care which the particular class of animals he is transporting require, he is relieved from the responsibility for injury which may occur through other causes than his own negligence;—as from the disposition of the animals, which may result in their own injury, notwithstanding all proper precautions, or from the effects of the climate.<sup>3</sup>

Where the owner has a man in charge of the stock, this essentially qualifies the obligation of the carrier.<sup>4</sup> But in many of the courts it is held that a railroad company drawing livestock in a car belonging to the stockowner is liable as a common carrier,

<sup>1</sup> *Cragin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539; *Missouri Pac. R. Co. v. Fugam*, 2 L. R. A. 75, 72 Tex. 127.

<sup>2</sup> *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319.

<sup>3</sup> *Blower v. Great Western R. Co.* L. R. 7 C. P. 655; *Evans v. Fitchburg R. Co.* 111 Mass. 142, 15 Am. Rep. 19; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Pardington v. South Wales R. Co.* 1 Hurlst. & N. 396; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191; *Penn v. Buffalo & E. R. Co.* 49 N. Y. 204, 10 Am. Rep. 355; *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319; *Illinois Cent. R. Co. v. Brelsford*, 13 Ill. App. 251; *Cragin v. New York Cent. R. Co.* 51 N. Y. 61, 10 Am. Rep. 559; *Kendall v. London & S. W. R. Co.* L. R. 7 Exch. 373; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 265; *McManus v. Lancaster & Y. R. Co.* 2 Hurlst. & N. 702, 4 H. & N. 346; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush, 645; *McCoy v. Keokuk & D. M. R. Co.* 44 Iowa, 424; *Lee v. Raleigh & G. R. Co.* 72 N. C. 286; *South & North Ala. R. Co. v. Heulien*, 52 Ala. 606, 23 Am. Rep. 578; *Evansville & C. R. Co. v. Young*, 28 Ind. 516; *McFadden v. Missouri Pac. R. Co.* 92 Mo. 343; *East Tennessee, V. & G. R. Co. v. Hale*, 85 Tenn. 69; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 46 Am. Rep. 104; *Smith v. Louisville & N. R. Co.* 86 Tenn. 198; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372; *Indianapolis & St. L. R. Co. v. Jurey*, 8 Ill. App. 160; *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393; *Risford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42; *Wilson v. Hamilton*, 4 Ohio St. 722.

<sup>4</sup> *Smith v. New Haven & N. R. Co.* 12 Allen, 531, 534, 90 Am. Dec. 166.

and cannot by contract exempt itself from liability for negligence.<sup>1</sup> Every limitation of the responsibility of a common carrier should be expressed in each case in clear and unequivocal terms, and a limit of value may be applied to one animal only of a shipment.<sup>2</sup> The mere fact of giving a pass, so that a servant of the owner may go with cattle which are shipped, does not relieve the carrier from responsibility for them.<sup>3</sup>

Stipulations in a stock transportation contract entered into between a shipper and an initial carrier are not available to a connecting carrier unless ratified by some act or course of conduct on its part between its receipt and delivery of the stock, where it is left to the option of connecting carriers either to accept or reject such stipulations. It is not the duty of a connecting carrier's car inspector, to remove animals from a car received by it from the initial carrier in order to examine the car from the inside for dangerous projections, such as nails or spikes, where the shipper, who is traveling with the stock, stipulated in the transportation contract that he had examined the car, and that it was suitable and sufficient.<sup>4</sup> A railroad company receiving cattle for transportation, is liable for their loss by becoming mingled with other cattle, and being loaded in the wrong car at a station where all the cattle are unloaded to be fed under the exclusive charge of its agents.<sup>5</sup> The liability of a railway company as a common carrier of stock attaches from the time of an actual delivery to and acceptance by the company, although the bill of lading is not signed until the following day, as Tex. Rev. Stat. art. 283, providing that the liability of common carriers shall attach, as at common law, after such signing, does not change the common law rule under which the liability began upon delivery.<sup>6</sup>

Where a railroad company receives for shipment a car of hogs which is overloaded, it assumes all the responsibilities of a com-

<sup>1</sup> *Fordyce v. McFlynn*, 56 Ark. 424.

<sup>2</sup> *Hopkins v. Westcott*, 6 Blatchf. 67.

<sup>3</sup> *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451.

<sup>4</sup> *Western R. Co. v. Harwell*, 97 Ala. 341.

<sup>5</sup> *Norfolk & W. R. Co. v. Suffolk*, 89 Va. 703.

<sup>6</sup> *International & G. N. R. Co. v. Dimmit County Pasture Co.* 5 Tex. Civ. App. 186.

mon carrier with reference to it, and cannot escape liability for damage to the property, on the ground that the car was overloaded.<sup>1</sup> When a carrier fails, without good excuse, to deliver the goods on demand after they have reached their destination, he continues to hold them as carrier at his own risk and peril. In the absence of statutory regulations, the liability of a common carrier continues after the goods have reached their destination, until the consignee has had a reasonable time to remove them; and after that time he is liable only as a warehouseman, or bailee for hire.<sup>2</sup> Where the carrier does not hold itself out as a common carrier of dogs, nor assume their transportation in that character, but, as a matter of accommodation to a passenger who was notified of its rules, permits its servant to receive them in its car, and accept pay for their transportation, such arrangement at most can only charge the carrier as a bailee, or private carrier.<sup>3</sup> Under a complaint charging the defendant as a common carrier, no recovery can be had upon proof of a liability as a private carrier only.<sup>4</sup>

The loss of animals through disease caused by negligence of the carrier, in fumigating or cleansing his means of transportation, after carrying diseased animals liable to spread the contagion, will render the carrier liable.<sup>5</sup> While the shipper is not bound to communicate to the carrier particulars in regard to the animals transported, which are evident to the most casual observation,<sup>6</sup> yet, peculiarities or defects in the animal not thus apparent, which would increase the risk and against which the carrier might adopt precautions, must be disclosed. A shipper of cattle is not bound to comply with all the requirements of the Texas Revised Statutes as to procuring and recording a certificate of

<sup>1</sup> *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 666.

<sup>2</sup> *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

<sup>3</sup> *Honeyman v. Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20.

<sup>4</sup> *Honeyman v. Oregon & C. R. Co. supra.* See note to *International & G. N. R. Co. v. Tisdale* (Tex.) 4 L. R. A. 545.

<sup>5</sup> *Tattersall v. National SS. Co.* L. R. 12 Q. B. Div. 297.

<sup>6</sup> *Estill v. New York, L. E. & W. R. Co.* 41 Fed. Rep. 849; *McJune v. Burlington, C. R. & N. R. Co.* 52 Iowa, 600.

inspection before delivering them to a carrier for shipment, but it is sufficient if the cattle have in fact been inspected.<sup>1</sup>

### § 65. *Forwarding by Connecting Line.*

A carrier that receives cattle consigned to a point beyond its own road, with an agreement to deliver to a connecting line, has the duty to deliver them to the connecting carrier safely, whether in the original cars or in cars furnished by the connecting road; and this duty includes providing suitable bedding for the cars, partitions to keep the cattle apart and proper care in not unduly crowding them. The authority of the agent of a railroad company to keep cattle in the original cars, or transfer them to others furnished by a connecting road, involves the duty of putting cars furnished by the latter in suitable condition, or else allowing the shipper to do so, under his contract to care for them during transportation.<sup>2</sup> A clause in a contract for the shipment of stock, limiting the liability of the carrier to its own line, enures to the benefit of each carrier over whose line the stock is shipped, and exempts it from liability for a connecting carrier's refusal to deliver the stock.<sup>3</sup> A carrier which receives horses for transportation under a contract that it shall not be liable for injuries sustained after delivery to a connecting line is not liable for injuries received by them on such line.<sup>4</sup> But if animals escape because of defective cars furnished by the initial carrier, beyond the limits of its own road, it will be liable, notwithstanding a contract limiting its liability to the end of its own line.<sup>5</sup>

A provision in a contract for the transportation of cattle, exempting the carrier from liability for the cattle after they pass into the hands of another carrier, except to protect the through rate of freight, is valid and available to a lessor railway company sued for injuries to cattle during transportation on a contract

<sup>1</sup> *International & G. N. R. Co. v. Wright*, 2 Tex. Civ. App. 198.

<sup>2</sup> *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294.

<sup>3</sup> *International & G. N. R. Co. v. Mahula*, 1 Tex. Civ. App. 182.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Allcorn* (Tex. Civ. App.) Sept. 13, 1893; *Beaumont v. Canadian Pac. R. Co.* 5 Mont. L. Rep. (Sup. Ct.) 255.

<sup>5</sup> *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504.

made by its lessee.<sup>1</sup> The failure of a railroad company to transfer stock immediately to a connecting line, or to notify the consignees or the agents of the connecting line for three hours after the arrival thereof, notwithstanding repeated inquiries therefor, constitutes gross negligence.<sup>2</sup> Loss of cattle delivered to a railroad company by its own negligence, committed before the cattle are delivered to a connecting carrier, is not within Va. Code, § 1295, providing that the liability of a carrier accepting anything for transportation beyond its own line shall extend to the point of ultimate destination, unless there is a contract in writing to the contrary signed by the shipper or his agent, and that even in such case the carrier shall be liable for the whole route unless within a reasonable time satisfactory proof shall be given to the consignee that the loss or injury did not occur while the thing was in its charge, although written contracts are signed by the shipper.<sup>3</sup>

Under a contract for the shipment of horses, stipulating that the carrier shall not be liable at all after the horses are delivered to its connecting line, except to protect the through rate of freight, the carrier is not liable for injuries received after it has delivered them in good condition at the stockyards of a connecting road.<sup>4</sup> A common carrier which has entered into a contract for the shipment of stock stipulating that its liability as a carrier shall cease upon delivery of the stock to a connecting line is not relieved from responsibility by delivering the animals to a stockyards company for delivery to the connecting carrier.<sup>5</sup> A carrier seeking to enforce a provision of a contract of shipment of livestock, that notice of damage to them shall be given, before their removal, to the station master at the station where they are delivered to a connecting road, must have afforded reasonable time, opportunity, and facilities for complying therewith.<sup>6</sup>

<sup>1</sup> *International & G. N. R. Co. v. Thornton*, 3 Tex. Civ. App. 197.

<sup>2</sup> *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590.

<sup>3</sup> *Norfolk & W. R. Co. v. Sutherland*, 89 Va. 703.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Tennant* (Tex. Civ. App.) June 8, 1893; *Alabama G. R. Co. v. Thomas*, 83 Ala. 343.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Eddins* (Tex. Civ. App.) April 25, 1894.

<sup>6</sup> *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 402.



Where a contract is made for the transportation of cattle to a point beyond the line of the road of the company with which the contract is made, the liability of the contracting road to cease at its terminus, a connecting company to which the cattle, after being transported over several roads, are finally delivered and by which they are delivered at their destination and all charges collected for carriage, is not liable as a partner or joint contractor for injuries received by the cattle on roads other than its own.<sup>1</sup>

A railroad company is liable for damages to stock caused by negligence, although the damage occurs on another line and the contract of shipment states that it will be liable only for injuries received on its own line, where the relationship of partners exists between the two companies.<sup>2</sup> A railroad company receiving horses from a connecting line, with notice that the shipper has attempted to prepay the freight for the whole transportation, but has not paid it in full at the regular rates, and also that he contemplates a continuous and speedy passage, has the right to carry the horses through to their destination, and claim a lien on them for the balance of the freight.<sup>3</sup> An initial railroad carrier contracting to "forward" cattle over its own and other lines, stipulating that the consignor should take care of the cattle while on the trip, and that it and connecting lines over which such freight should pass, should not be responsible for any loss, damage or injury which might happen in loading, forwarding or unloading, by suffocation or by any other cause, except gross negligence,—such carriers being deemed merely forwarders and only liable for gross negligence—are not released by such contract from their liability as a carrier for the entire distance, from any loss resulting from ordinary negligence from itself or a connecting carrier.<sup>4</sup>

A contract by a railroad carrier exempting itself from liability for the negligence of a packet company, with which it makes connection to complete a through route over which it has contracted to carry the cattle, is reasonable, and is not affected by the

<sup>1</sup> *Ft. Worth & D. C. R. Co. v. Williams*, 77 Tex. 121.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Wilson* (Tex. Civ. App.) April 25, 1894.

<sup>3</sup> *Crossan v. New York & N. R. Co.* 3 L. R. A. 766, 149 Mass. 196.

<sup>4</sup> *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan. 505.

"Railway and Canal Traffic Act," of 1854.<sup>1</sup> Under a contract with the initial carrier which, by its running arrangements, was acting in fact as the agent for a connecting carrier, but under which no responsibility was assumed for any loss or injury to cattle in the delivering,—if such injury should be occasioned by kicking, plunging or restiveness,—the contracting carrier was held liable where, in the act of delivery against the protest of the consignee, the cattle were unnecessarily released and were killed by the cars of the connecting carrier.<sup>2</sup>

### § 66. *Damages for Refusal or for Failure to Transport.*

For refusal of railroad company to transport stock, the measure of damages is the difference between the market value at the place of shipment and the place of delivery.<sup>3</sup> But it is said that it is error to consider their value at the market or place of destination, in the absence of evidence or averment in the complaint that defendant's agent, at the time of contracting to furnish cars, was informed that the cattle were intended for sale at such place.<sup>4</sup> If there has been a conversion of the property, the recovery is for the value at the time it should have been delivered.<sup>5</sup> In an action for damages for the breach of an agreement by a railroad company to bring all live stock transported over its road to plaintiff's stock yard, evidence of the number of cars loaded with stock and transported by the company is admissible in determining the question of damages.<sup>6</sup> Accidents and other causes which excuse delay, do not relieve from the duty to transport, which must be done as soon as the obstruction can reasonably be removed.<sup>7</sup> A

<sup>1</sup> *Doolan v. Midland R. Co.* 10 Ir. C. L. Rep. 47; overruling *Moore v. Midland R. Co.* 9 Ir. C. L. Rep. 20.

<sup>2</sup> *Gill v. Manchester, S. & L. R. Co.* L. R. 8 Q. B. 186.

<sup>3</sup> *Birney v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 470; *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273.

<sup>4</sup> *Gelvin v. Kansas City, St. J. & C. B. R. Co.* *supra*.

<sup>5</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489; *St. Louis, I. M. & S. R. Co. v. Mulford*, 44 Ark. 439; *Curd v. Hine*, 39 Fed. Rep. 818.

<sup>6</sup> *Terre Haute & I. R. Co. v. Struble*, 109 U. S. 381, 27 L. ed. 970.

<sup>7</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489; *Elliott v. Rossell*, 10 Johns. 7, 6 Am. Dec. 306; *King v. Shepherd*, 3 Story, 349; *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

common carrier which wrongfully refuses to receive stock properly tendered to it from a connecting line, thereby contributing to an injury to it, will be liable to the owner for the entire damage, even though the other line may have been guilty of negligence rendering it also liable.<sup>1</sup> Failure to forward freight by another line as contracted, will render the carrier liable.<sup>2</sup>

A boat employed by the purchaser of coal to carry it from the place where it was purchased, and which has an order for the coal, which is accepted by the seller, with a provision that no liability is to be incurred for delay or failure in furnishing a load, is nevertheless entitled to be loaded in its turn; and the exception from liability for delay does not include a willful or negligent disregard of the contract.<sup>3</sup> A shipper is not in fault for failure to furnish cars under a contract of shipment providing that he shall furnish the cars and load them at a certain station, where he notifies the railroad company that cars to be used in the business are at certain other stations, that he desires the company to take them from another company in whose possession they are and which had been directed to turn them over, and the railroad company does not decline to get the cars, or claim that the shipper is bound to make any other delivery of them, or that there is any difficulty in getting them, but merely fails to accept them and commence the shipment within the time specified in the contract.<sup>4</sup> Proof that the next carrier would not receive the goods from it at the termination of its line will not excuse the carrier for failure to deliver to a particular place.<sup>5</sup>

### § 67. *Delay in Shipment and Delivery of Live-stock.*

Where a carrier is delayed in delivering livestock to market, it may excuse the delay by proof of misfortune or accident, although not inevitable or produced by the act of God. But evidence of

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Godair*, 3 Tex. Civ. App. 514.

<sup>2</sup> *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278.

<sup>3</sup> *Melloy v. Lehigh & W. Coal Co.* 37 Fed. Rep. 377.

<sup>4</sup> *Lawrence v. Milwaukee, L. S. & W. R. Co.* 84 Wis. 427.

<sup>5</sup> *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272.

such accident and delay is not admissible to excuse the delivery of the stock in bad order, unless there is offered with it evidence to prove that it used the highest degree of care during the delay for the preservation and safety of the animals.<sup>1</sup> A railroad common carrier stands upon the same footing as other common carriers, and may excuse delay in the delivery of cattle by accident or misfortune not inevitable or produced by acts of God, and all that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay.<sup>2</sup>

The failure of an engineer in charge of a train containing a carload of stock, to receive orders for the movement of the train, caused by atmospheric or other influences beyond the carrier's control rendering unavailable the telegraph wires, is excusable so as to prevent a recovery for damages to the stock by delay in its shipment, where it was in fact transported and delivered, whether the failure of the wires to transmit the message was attributable to the act of God or not.<sup>3</sup> A railroad company receiving live stock for shipment is not necessarily obliged to send it on the first train thereafter leaving, but merely to send it within a reasonable time.<sup>4</sup> But a carrier of livestock is bound to forward the animals with reasonable despatch, and is not relieved from liability merely by the fact that the car containing the animals was forwarded by the next regular train, regardless of the time when the train left and of the facilities possessed by it for avoiding delay,<sup>5</sup> and a carrier of livestock is liable for damages caused by delay in shipment resulting from a washout on the main line, if it makes no effort to carry them by a way which it has around the washout, over which it has carried other cattle pending the washout.<sup>6</sup> A carrier

<sup>1</sup> *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 666.

<sup>2</sup> *Greismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 26 Am. & Eng. R. Cas. 290; *Wibert v. New York & E. R. Co.* 12 N. Y. 245; *Blackstock v. New York & E. R. Co.* 20 N. Y. 48, 75 Am. Dec. 372; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391; *Bartlett v. Pittsburg, C. & St. L. R. Co.* 94 Ind. 281.

<sup>3</sup> *International & G. N. R. Co. v. Hynes*, 3 Tex. Civ. App. 20.

<sup>4</sup> *Pennsylvania Co. v. Clark*, 2 Ind. App. 153, affirming on rehearing, 2 Ind. App. 146.

<sup>5</sup> *Galveston, H. & S. A. R. Co. v. Tuckett*, (Tex. Civ. App.) Feb. 7, 1894.

<sup>6</sup> *Missouri, K. & T. R. Co. v. Olive* (Tex. Civ. App.) Oct. 4, 1893.

is not bound to furnish cars to carry livestock on Sunday; yet having received stock into pens for transportation it becomes its duty to ship without unreasonable delay.<sup>1</sup> Cattle loaded on the cars at 6 o'clock p. m. on Friday, which are not moved by the railroad company until 4 o'clock on Saturday, when it is too late for them to reach their destination in time for the Saturday market, are not shipped within a reasonable time, and the company is liable for the delay.<sup>2</sup>

A carrier which accepts livestock for shipment, cannot excuse itself from liability for injuries resulting from delay in transportation, on the ground that there was an unusual rush of business on its road.<sup>3</sup> But a carrier is relieved from liability for failure to furnish cars for the transportation of stock, where it has sufficient cars to meet all ordinary demands, and an unusual demand has put all its cars in use, rendering it unable to furnish those demanded, and it furnishes them as soon as it can with due regard to the rights of other shippers who had previously or at the same time demanded transportation.<sup>4</sup>

That the carrier is liable for damages arising from the failure to transport stock within a reasonable time is well settled, but what is a reasonable time, under the particular facts of the case, or what circumstances will excuse the failure to deliver, within a reasonable time, the carrier would have the right to show, in order to relieve itself of liability for this element of damage. Evidence offered to relieve a carrier of liability caused by the detention of a horse was that "a strike existed, during the existence of which no freight or livestock trains could be or were run over the lines, by reason of the interference of strikers and those acting in concert with them." This was held admissible, for the purpose of showing a sufficient excuse for the failure of the carrier to deliver the horse during the period of his detention. If it could be shown that "no freight or live stock trains were or could be run over the road, because of the interference of the strikers,"

<sup>1</sup> *Guinn v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 453.

<sup>2</sup> *Cincinnati, I. St. L. & C. R. Co. v. Case*, 122 Ind. 310.

<sup>3</sup> *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

<sup>4</sup> *Pittsburg, C. C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209.

it might have shown that the horse was, under the circumstances, delivered within a reasonable time, or a sufficient excuse for the failure to deliver within such time; and in either event, would have relieved the carrier of liability.<sup>1</sup> Where livestock—cows and calves—were accepted, freight paid, and receipt given, for transportation, without express contract or limitation, and, being delayed by a snowstorm, were put in a stockyard, where they died, and others were injured by cold and exposure, the railroad company was liable for damages as a common carrier.<sup>2</sup> Failure of a railroad company to unload horses transported by it, at the time agreed upon by the company's agent, renders it liable for damages resulting to the horses from such failure, although the conductor of the train on which they were shipped stated to the owner a few minutes before the train started that he did not think they could be unloaded at the time agreed upon.<sup>3</sup> Where plaintiff was induced to ship a consignment of horses so that they would arrive at their destination in the night time, by the assurance of the carrier's agent that there would be no delay in unloading them, the carrier is liable for damages suffered by reason of the horses taking cold on account of such delay, they having become heated by fright and excitement during transportation.<sup>4</sup>

A carrier who, contrary to his uniform usage, fails to give notice of the arrival of goods, or wrongfully detains them after they have been applied for by the consignee, is guilty of such negligence in exposing them to loss or damage by a subsequent freshet, occurring while they are in his possession, and before giving notice of their arrival, as to deprive him of excuse by the act of God.<sup>5</sup> A contract by a railroad company for the transportation of horses and their delivery at its depot, providing for their storage unless called for, and containing stipulations in relation to unloading which imply that the company will unload them, requires the company to unload the horses at the place of destina-

<sup>1</sup> *Louisville, N. A. & C. R. Co. v. Hart*, 4 L. R. A. 549, 119 Ind. 273.

<sup>2</sup> *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451.

<sup>3</sup> *Corbett v. Chicago, St. P. M. & O. R. Co.* 86 Wis. 82.

<sup>4</sup> *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

<sup>5</sup> *Richmond & D. R. Co. v. White*, 88 Ga. 805.

tion, notwithstanding a usage of its agent there, known to the shipper, of requiring owners of animals to unload them.<sup>1</sup>

a. *Breach of Contract for Cars.*

A carrier is liable to a shipper of livestock in damages for breach of its agreement to furnish cars for shipment thereof at a certain time and place, and is not excused by reason of an accumulation of livestock received from connecting carriers and local shippers.<sup>2</sup> It cannot plead ignorance of the existence of a contract of shipment made by letters and recognized as such by it, on the ground that it was misled by the promise of the shipper to make out a contract at a specified time, where, after notice by the latter to obtain the cars which he was to furnish, it fails unreasonably so to do, so as to relieve it from liability in damages for the consequences of its delay.<sup>3</sup> A shipper's order to a common carrier of livestock for a certain number of cars, to be furnished at a specified time and place, when accepted by the carrier, constitutes a contract binding the carrier to furnish the cars and the shipper to furnish the stock to load them; and the fact that the shipper did not own or have the stock when the contract was made does not affect the liability of the carrier for failure to provide the cars, on the ground that its promise so to do was without consideration.<sup>4</sup> The station agent of a railroad company has presumptively authority to receive and forward freight, and may bind the company by a contract to furnish, on a certain day named, cars for the transportation of livestock, although in making such contract he may have, unknown to the shipper, exceeded his authority.<sup>5</sup>

A carrier is liable to a shipper of cattle for delay in compliance with a contract to ship them, where such delay is caused by the presentation for shipment of cattle by a third person, and the use

<sup>1</sup> *Benson v. Gray*, 13 L. R. A. 262, 154 Mass. 391. See *post*, chap. XI., on "Delay in Carriage and Transportation of Goods."

<sup>2</sup> *Cross v. McFaden*, 1 Tex. Civ. App. 461.

<sup>3</sup> *Lawrence v. Milwaukee, L. S. & W. R. Co.* 84 Wis. 427.

<sup>4</sup> *Pittsburg, C. C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209.

<sup>5</sup> *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273.

of the cars contracted for to ship the latter's cattle, although such shipment was necessary.<sup>1</sup> No excuse for the breach by a carrier of its contract to furnish a car and transport cattle to a certain place by a certain day is furnished by the fact that the shipper's object in naming that day was to enable him to offer the cattle for sale on Sunday contrary to law, unless that object entered into the contract as part of the inducement or consideration.<sup>2</sup> Delivery of cars by a railroad company at any hour during the day for which they are ordered, though too late to be used that day, is sufficient where no hour has been specified in the order.<sup>3</sup>

b. *Damages to Livestock by Delay in Transportation.*

Notice of damage to stock, required by a shipping contract to be given before the removal of the stock from the possession of the carrier, is not required in the case of a claim for damages for delay in transportation.<sup>4</sup> The measure of damages for loss, by reason of the delay and by fall in the price of the cattle, is the difference between the market value at the place of delivery at the time the cattle would have arrived there if defendant had kept its contract, and their value at the same time at the place of shipment. But it is error to consider their value at the market or place of destination in the absence of evidence or averment in the complaint that defendant's agent, at the time of contracting to furnish cars, was informed that the cattle were intended for sale at such place.<sup>5</sup> In an action against a carrier by a shipper of cattle for delay in carrying them to a certain market, proof that the carrier's agent knew at the time of shipment that the cattle were being shipped to such market for immediate sale shows knowledge of the carrier. A provision in a contract for the shipment of cattle, limiting the shipper's damages, in case of loss or partial loss, to the value of the cattle at the place of shipment,

<sup>1</sup> *International & G. N. R. Co. v. Wright*, 1 Tex. Civ. App. 403.

<sup>2</sup> *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, 110 N. C. 338.

<sup>3</sup> *McGrew v. Missouri Pac. R. Co.* 109 Mo. 582.

<sup>4</sup> *Louisville & N. R. Co. v. Bell*, 13 Ky. L. Rep. 393.

<sup>5</sup> *Gelvin v. Kansas City, St. J. & C. B. R. Co.* 21 Mo. App. 273.



cannot affect the shipper's right to recover the true value, if loss is caused by the carrier's negligence, and where cattle, with the carrier's knowledge, are shipped to a certain market to be immediately sold there, in determining their value, in an action against the carrier for loss, where, by the negligence of the carrier such cattle are delayed by a wreck, the shipper is entitled to recover the difference in the state of the market at the time the cattle are, and at the time they should have been, delivered, and the shrinkage in weights caused by the wreck and delay, to be ascertained by reference to the destined market when the cattle should have reached there. Interest may be allowed on the amount of damages sustained, though it is not asked for in the pleading. An instruction that defendant is not liable for injuries done to the cattle by each other by reason of their inherent viciousness is properly refused, if defendant has not raised such issue by pleading and proof, and no evidence of such injuries is brought out by plaintiff.<sup>1</sup> Where, on account of a carrier's negligence, livestock arrives at its destination too late for the market that week, and there is no market until the first of the following week, when a portion of the stock is sold, and the rest, which might also have been sold at the same time, is kept by the owner till later in the week, when it is sold at a less price than it would have brought on the day when the former portion was sold, the owner is not entitled to recover for the depreciation in value up to the day of the final sale, but only to the day of the sale of the former portion.<sup>2</sup>

A common carrier is liable for all damage to live-stock from negligent delay in its transportation and delivery whereby they are reduced in weight more than they would have been had prompt carriage and delivery been made, and whereby they injure each other in consequence of viciousness aroused by the excess of their confinement beyond the time necessary for their transportation and delivery.<sup>3</sup> A railroad company which as a bailee for hire receives horses for transportation under a contract

<sup>1</sup> *Ft. Worth & D. R. Co. v. Greathouse*, 82 Tex. 104.

<sup>2</sup> *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

<sup>3</sup> *Richmond & D. R. Co. v. Trousdale*, 99 Ala. 389.

providing that it shall not be liable for any loss to the shipper by reason of delay of the trains, and that the stock is to be fed, watered, and cared for while on the cars by the shipper at his own expense and risk, is bound to furnish the shipper an opportunity to feed and water the horses, where the train is delayed.<sup>1</sup> A vessel is liable for the keep and loss of weight on cattle and sheep during the delay in sailing after notice to the shipper that she would sail on a certain day. But a shipper of cattle cannot recover damages for delay in the sailing of a vessel on which they are carried, if, after knowing of the delay, they could have been sold without loss.<sup>2</sup> Where, during a wrongful detention of cattle by ship owners, to compel the payment of an unfounded claim for one day's demurrage, the market price declined, the ship owners were liable for the loss in the price of the cattle.<sup>3</sup>

*c. Opinion of Expert Witnesses as to Damages.*

Beef cattle were shipped over a railroad to Chicago, to be there sold immediately on arrival. In an action against the carrier for negligence in carrying the cattle, by which they lost in weight, it was shown that by reason of a wreck they were shaken up and bruised, and were confined in the cars several hours longer than they would otherwise have been. Their weight when they arrived in Chicago was proven, but their weight at the point of shipment was not known. It was held, that a witness familiar with the shipment of cattle from such point to Chicago, who was with the cattle in transit, and was present and saw the effect of the wreck, was properly allowed to give his opinion as to the loss of the cattle in weight by reason of the wreck and of the consequent delay. In such a case a witness who has had large experience in the shipment of cattle, though he may have no personal knowledge of the cattle in controversy, may give his opinion as to their loss in weight, after the fact of the wreck and its results as to the

<sup>1</sup> *Smith v. Michigan C. R. Co.* (Mich.) April 17, 1894.

<sup>2</sup> *Goldsmith v. Tower Hill SS. Co.* 37 Fed. Rep. 806.

<sup>3</sup> *The Suffolk*, 31 Fed. Rep. 835.

injury and delay of the cattle are stated to him as a hypothetical case; and it is immaterial that the case as stated does not cover the full range of the facts, provided enough is given to enable the witness to formulate an intelligent opinion.<sup>1</sup>

### § 68. *Damages for Negligent Loss of or Injury to Cattle.*

A shipper of cattle is entitled to recover from the carrier for a loss in value of the stock caused by the gross negligence and carelessness of the agent of the shipper in handling and transporting the cattle, consisting of unnecessary delay in transportation, needless confinement in the cars at the different stations on the road, and bruising and bumping caused by improper transportation.<sup>2</sup> In an action to recover damages for injury to cattle caused by negligence in the defendant railroad company, if its method of transportation was unsafe, as omitting means of ventilation and cleats on the floors to furnish footing, the fact that it was usual with the defendant cannot exonerate it from its contract to safely transport. Its own usage would have no tendency to show that it had adopted a safe method.<sup>3</sup>

Notice to a carrier that cows shipped are pregnant is not necessary in order to recover damages for miscarriages caused by injuries (not chargeable to the inherent nature or disposition of the animals) in transportation.<sup>4</sup> Where mares being with foal are shipped, they constitute freight having what is called an inherent defect; and if they lose their foal on the way from causes for which the carrier is responsible, the measure of damages is not the difference in their market value as they are and what it would have been had they arrived in good condition; but if the loss is total, it is the price, less freight charges, they would have brought if delivered in reasonable time, having had due and necessary care while in the carrier's possession; and if the loss is partial, it

<sup>1</sup> *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104.

<sup>2</sup> *Good v. Galveston, H. & S. A. R. Co. (Tex.)* 4 L. R. A. 801.

<sup>3</sup> *Leonard v. Fitchburg R. Co.* 143 Mass. 307.

<sup>4</sup> *Estill v. New York, L. E. & W. R. Co.* 41 Fed. Rep. 849.

is the difference between such price, less freight, and the actual value of the animals as delivered.<sup>1</sup> Suit was brought to recover damages for injury to horses shipped by rail. The owner, for two days, refused to receive the horses at the place of destination, owing to some extra charges. It was held that no expense thereafter incurred could be properly charged to defendants.<sup>2</sup>

It is not sufficient to hold the carrier responsible to introduce proof of the death of live stock; but there must be shown some injury to the animal, not presumably the result of its inherent disposition and nature; or that the injury shown has aggravated what may have resulted from such inherent causes.<sup>3</sup> A carrier is not liable for the death, a few days after its delivery, of a calf alleged to have been injured during transportation, where it was sick when it was delivered to the company, and there is no evidence that it sustained any injury while in the company's possession or that it was not properly fed and watered, or to show that its sickness, if its death was caused thereby, was not occasioned by natural causes, or to show whether it died from such sickness or from injuries which occasioned bruises found on its after its death, but not on it when delivered by the company to the owner.<sup>4</sup> On an issue in an action against a carrier for the killing and injuring of cattle during transportation, as to whether or not the manner in which the shipper loaded the cars with the cattle was the cause of at least some of the injuries sustained, and, if so, to what extent, it is error to refuse an instruction that no recovery can be had for injuries resulting from the promiscuous intermingling of the cattle.<sup>5</sup>

A carrier transporting a mule in a suitable car with adequate equipments and appliances, without culpable delay or negligence or want of care on the part of its employes in handling the stock, over a track in good condition, is not liable for an accident to the mule by which his hoof is torn off, in the absence of evidence

<sup>1</sup> *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127.

<sup>2</sup> *Louisville & N. R. Co. v. Trent*, 16 Lea, 419.

<sup>3</sup> *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577.

<sup>4</sup> *Missouri Pac. R. Co. v. Heath* (Tex.) Dec. 1, 1891.

<sup>5</sup> *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307.

showing how it occurred. A carrier is not liable for an injury inflicted by a live animal upon himself during transportation, or by other animals properly shipped in the same car, without fault on the part of the carrier.<sup>1</sup> A special charge requested in an action against a carrier for cattle alleged to have been killed and injured during transportation, that there must be evidence of the exact number of the dead and injured cattle to entitle plaintiff to recover, is properly denied as too restrictive where there is evidence showing the average value of the killed and injured cattle, and also evidence from which the number of each could be ascertained by the jury. The mere fact that cattle shipped died after their delivery at the point of destination is not sufficient to relieve the carrier of liability on the ground that the damage is too remote, if the death of the cattle resulted solely from injuries received by reason of the carrier's negligence while transporting them.<sup>2</sup>

The mere fact of giving a pass so that a servant of the owner may go with cattle which are shipped, does not relieve the carrier from responsibility for them.<sup>3</sup> But where by special contract the owner agrees to and does take charge of the stock, the burden of proving negligence is on him.<sup>4</sup> Where the shipper by the bill of lading, assumes the risk of transportation, except for the carrier's negligence, and accompanies the train, and one of the horses is found dead upon arrival at the destination, but the cause of death is not shown, the carrier is not responsible.<sup>5</sup>

A complaint against a railway company to recover a stated sum as damages for its alleged negligent injury of plaintiff's horse, not alleging that the company is a common carrier or that the horse was delivered to it to be transported, or setting up any contract of affreightment, or that anything was paid or promised to be paid for transportation,—is insufficient to warrant a recovery against the company as a common carrier. No recovery can be had

<sup>1</sup> *Louisville, N. O. & T. R. Co. v. Bigger*, 66 Miss. 319.

<sup>2</sup> *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307.

<sup>3</sup> *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451.

<sup>4</sup> *McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445.

<sup>5</sup> *Pennsylvania R. Co. v. Raiordon*, 119 Pa. 577.

against a railway company sued on an implied contract to transport a horse, constituted by its acceptance and transportation according to the shipper's directions, without proof of any reward paid or promised, except for damages to the horse occasioned by its gross negligence; and such negligence is not shown where the evidence is uncontradicted that it exercised reasonable and proper care to avoid injuring the animal.<sup>1</sup> But the generally accepted rule that some injury to the animal, not presumably the result of its inherent nature or disposition; or that if any injury resulted from such inherent causes, it has been aggravated by other injuries, is not universally accepted.<sup>2</sup> In an action for damages for injury and loss of cattle by negligence of the carrier, brought against the lessee of the road with which the contract of shipment was made, notice of loss given to the general freight agent of the lessor road, in pursuance of the terms of the contract, and service of summons upon the proper station agent of defendant company, is sufficient.<sup>3</sup>

### § 69. *Liability for Miscarriage and Wrongful Delivery of Livestock.*

A carrier must deliver cattle to the party designated by the terms of shipment, or to his order, at the place of destination: and where it delivers them to one not entitled to receive them, it is accountable. Direction on waybills to notify a third party named does not qualify the duty of the carrier to deliver cattle to the order of the consignee. The last carrier in connecting lines must deliver cattle at the place of destination, and to the consignee there, if he was made known to it on receiving the freight from the preceding connecting company. The custom of a company of delivering cattle without requiring the production of the bill of lading or authority of the shipper, does not relieve it from liability for cattle wrongfully delivered. Indorsement, by the shipper to plaintiff, of receipts taken on the shipment of cattle,

<sup>1</sup> *Louisville & N. R. Co. v. Gerson* (Ala.) Feb. 13, 1894.

<sup>2</sup> *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539. But see *Hussey v. The Taragossa*, 3 Woods, 380.

<sup>3</sup> *Reynolds v. St. Louis, I. M. & S. R. Co.* 22 Mo. App. 609.

transfers their title and gives plaintiff the right to their possession, and, if necessary, to sell them for payment of drafts taken by him against the shipper.<sup>1</sup> Where the agent pointed out the car upon which hogs were to be loaded, and plaintiff loaded them on the car pointed out, but by mistake of the agents and employes of the company the consignment miscarried, the company is liable.<sup>2</sup> The carrier becomes liable as for a conversion the moment it makes an unauthorized delivery to another than the person designated.<sup>3</sup>

### § 70. *Stipulation for Notice of Injury to Livestock.*

A stipulation in a contract for the shipment of stock from one state to another, requiring notice of damage to be given to an agent at the point of shipment as a condition precedent to a recovery, without specifying or naming any particular agent either at the point of shipment or of destination, to whom such notice may be given,—is unreasonable.<sup>4</sup> Texas Act of March 4, 1891, providing that no provision in a contract limiting the time within which to sue to less than two years shall be valid, and that no stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall be valid unless the stipulation is reasonable, is not invalid as attempting to interfere with or regulate interstate commerce.<sup>5</sup>

#### a. *Limit of Time for Notice.*

When, on shipping cattle by a railroad, a written contract is entered into between the carrier and the shipper, that in case of loss no damages shall be paid unless a claim in writing for such

<sup>1</sup> *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. ed. 287.

<sup>2</sup> *Wilson v. Wabash, St. L. & P. R. Co.* 23 Mo. App. 50.

<sup>3</sup> *Fulton v. Lydecker*, 41 N. Y. S. R. 457; *Wilson v. Adams Exp. Co.* 43 Mo. App. 659; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489; *Clayton v. Boston & L. R. Co.* 7 Allen, 341; *Viner v. New York, A. G. & W. S. S. Co.* 50 N. Y. 23.

<sup>4</sup> *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.) Feb. 7, 1894.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Eddins* (Tex. Civ. App.) April 25, 1894.

damage shall be delivered to the carrier in five days after the removal of the cattle from the cars, no recovery can be had for a loss unless such written claim shall be so delivered.<sup>1</sup>

A contract by a common carrier requiring suit for damages to livestock to be instituted within forty days after the injury occurs is supported by a sufficient consideration if the stock is transported under such contract at less than the regular rates according to actual weight.<sup>2</sup> A stipulation in a common carrier's contract of interstate shipment, requiring notice of a claim for damages to be given within a specified time, is valid, in the absence of any statute to which the contract is subject, where such time is reasonable and adapted to the circumstances of the particular case.<sup>3</sup> A condition of a contract for the shipment of horses, that no claim for loss or damage shall be valid unless made in writing within thirty days after the same occurs, is reasonable and binding upon the owner when made or authorized by him.<sup>4</sup> And a stipulation in a contract of shipment, that a carrier shall not be liable for damages unless action is commenced within forty days after the damages occur, is binding upon the parties unless subsequently waived.<sup>5</sup>

Noncompliance with a stipulation in a contract for carrying livestock, that notice of claims for injuries must be made within twenty-four hours after arrival at destination, will not prevent a recovery if at that time the injuries appear to be slight, but the animal, after receiving proper care, proves to be seriously and permanently injured, shortly after which the agent of the company is notified and answers that the claim is being investigated and will be settled on its merits.<sup>6</sup> A stipulation in a shipping contract requiring the shipper to give written notice of his claim for damages does not apply to damages which accrued prior to

<sup>1</sup> *McBeath v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 445.

<sup>2</sup> *Texas & P. R. Co. v. Klepper* (Tex. Civ. App.) Dec. 20, 1893.

<sup>3</sup> *Galveston, H. & S. A. R. Co. v. Williams* (Tex. Civ. App.) Feb. 7, 1894.

<sup>4</sup> *Armstrong v. Chicago, M. & St. P. R. Co.* 53 Minn. 183.

<sup>5</sup> *Galveston, H. & S. A. R. Co. v. Silegman* (Tex. Civ. App.) Oct. 4, 1893.

<sup>6</sup> *Hurned v. Missouri Pac. R. Co.* 51 Mo. App. 482.



the making of the contract.<sup>1</sup> Nor will a limitation in a shipping contract as to the time within which actions must be brought for damage to the property apply to an action for damages for the escape of stock before loading, due to the failure of the company to provide a sufficient pen, although the liability of the railroad company is that of a carrier.<sup>2</sup> The oral notice is not a sufficient compliance with the condition.<sup>3</sup> Where a shipper fails to comply with a condition in the contract of carriage requiring such a written notice, he is not entitled to recover.<sup>4</sup>

A contract requiring the shipper of livestock to give notice of injury thereto, to the station agent or some general officer of the carrier at the delivering station, is unreasonable and cannot be enforced, unless it is made to appear that the person to be notified is so conveniently accessible to the person who is to give the notice, that the latter can reasonably discharge the duty within the time limited by the contract.<sup>5</sup> Such a contract is unreasonable and void where the stock is to be delivered at a place where the carrier has a large number of agents and officers, when it leaves upon the shipper the responsibility of deciding which is the authorized officer, but not when the delivery is to be made at a place where the carrier has but one agent, easily to be distinguished and easy of access.<sup>6</sup> It is unreasonable where the carrier's line is not a through one, and it has no agents at such destination, and no reasonable facilities for giving such notice, and the shipper would be obliged to go to another state in search of someone on whom to serve the notice.<sup>7</sup>

<sup>1</sup> *Missouri, K. & T. R. Co. v. Graves* (Tex. App.) May 3, 1890.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 275.

<sup>3</sup> *Goggin v. Kansas Pac. R. Co.* 12 Kan. 416.

<sup>4</sup> *Sprague v. Missouri Pac. R. Co.* 34 Kan. 347. See also *Massengale v. Western U. Teleg. Co.* 17 Mo. App. 257; *Weir v. Adams Exp. Co.* 5 Phila. 355; *Cole v. Western U. Teleg. Co.* 33 Minn. 227; *Hirshberg v. Dinsmore*, 12 Daly, 429; *Young v. Western U. Teleg. Co.* 2 Jones & S. 390; *United States Exp. Co. v. Harris*, 51 Ind. 127; *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 385.

<sup>5</sup> *Missouri Pac. R. Co. v. Puine*, 1 Tex. Civ. App. 621.

<sup>6</sup> *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302.

<sup>7</sup> *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625.

b. *Forbidding Removal before Notice.*

A stipulation in a contract of shipment requiring notice of a written demand for damages claimed, to be presented before the property is removed from the point of destination and mingled with other property, is not as a matter of law an unreasonable one.<sup>1</sup> But whether or not it may be doubted if a contract is valid, containing a precedent condition to a shipper's right of action to recover for injury to his cattle, caused by the carrier's negligence, requiring a written notice to some officer or nearest station agent, before the injured cattle are removed or mingled with other stock, certainly if a carrier sets up a claim to notice of a given fact as a condition upon which its liability to a shipper is to depend, then it is incumbent on it, when the notice was to be given to one of its officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case where the shipper, by the terms of the contract, is to hold the property shipped at the place of delivery, to be inspected by some agent of the carrier, at his own expense and risk.<sup>2</sup> A custom cannot require that a shipper should expressly agree as a condition precedent to his right to damages for injury to stock during transportation, that he would give notice before removing the stock.<sup>3</sup>

A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal, and before they had mingled with other stock, or been removed from the place of des-

<sup>1</sup> *Galveston, H. & S. A. R. Co. v. Williams* (Tex. Civ. App.) Feb. 7, 1894.

<sup>2</sup> *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166; *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 4 L. R. A. 801.

<sup>3</sup> *Missouri Pac. R. Co. v. Fugan*, 2 L. R. A. 75, 72 Tex. 127.

tion, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car, and ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company, it was decided that there had been a sufficient compliance with the contract upon the part of the shipper.<sup>1</sup>

A railroad company is not absolved from liability for injuries to stock transported by it, occasioned by the negligence of its employes, by a clause in the shipping contract providing that it shall not be liable unless written notice is given before removal of the property from the car, where it had a good, fair, and reasonable opportunity to inspect the stock before removal.<sup>2</sup> Such a contract was sufficiently complied with by notice in writing two weeks after delivery, where the loss was one of weight by delay in delivery, was not apparent at or before the time of delivery, and its extent could only be determined by the shipper after his return home by a comparison of the actual weight of the animals when sold with that when bought as it appeared upon his books, and such letter was sent within a reasonable time after his return.<sup>3</sup> So notice of such injury given to the agent of the connecting carrier at the point of destination is a sufficient compliance and performance.<sup>4</sup>

Where a railroad company accepts cost of transportation for an injured horse, with the full knowledge of his condition, and furnishes cars and the same agents to bring back the horse to the place of shipment who had charge of him when shipped to the place where he was injured, a stipulation in the contract by which the shipper agrees not to remove the horse if injured before notice of a claim for damages, is waived.<sup>5</sup> In such an action a provision in the contract of shipment requiring the shipper, in case

<sup>1</sup> *Atchison, T. & S. F. R. Co. v. Temple*, 13 L. R. A. 262, 47 Kan. 7.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Temple*, *supra*; *Atchison, T. & S. F. R. Co. v. Collins*, 47 Kan. 11.

<sup>3</sup> *Louisville, N. A. & C. R. Co. v. Steele*, 6 Ind. App. 183.

<sup>4</sup> *Wichita & W. R. Co. v. Koch*, 47 Kan. 753.

<sup>5</sup> *Owen v. Louisville & N. R. Co.* 8 Ky. 626.

of loss or injury, to give the carrier notice of his claim therefor before removing the cattle from the place of delivery, so that the claim may be investigated, will not be enforced against plaintiff, in the absence of pleading and proof, on the part of defendant, of facts showing that the provision is reasonable.<sup>1</sup> The contract itself, where it is based upon a special rate, has been generally sustained.<sup>2</sup> A carrier of livestock under a contract providing that notice of claim of loss or injury be given its nearest station agent before removal of the stock from the place of delivery is relieved from liability by failure of the shipper to give such notice until twelve days after removal, when there was an agent at the place of delivery to whom notice could have been given.<sup>3</sup>

### § 71. *Restricting Liability for Livestock.*

In the United States, at least since the case of *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465, it has been the universal law of this country that, in the absence of a statute prohibiting it, any common carrier may by special contract limit the common law liability, provided the contract is "just and reasonable in the eye of the law," for in all the cases the ultimate test applied by the courts in determining whether a condition limiting the common law liability was or was not against public policy has been whether, under all circumstances, it was or was not just and reasonable in the eye of the law. In a leading case<sup>4</sup> the court placed its decision that a carrier could not stipulate for exemption from responsibility for the negligence of himself or his servants upon that express ground.

By section eight of the English Railway & Canal Traffic Act, companies coming under the act are declared liable for the loss or injury to any horse, cattle, or other animals or goods, occa-

<sup>1</sup> *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104.

<sup>2</sup> *Selby v. Wilmington & W. R. Co.* 113 N. C. 588; *Owen v. Louisville & N. R. Co.* 87 Ky. 626. In direct conflict with this is the case of *Smitha v. Louisville & N. R. Co.* 86 Tenn. 198.

<sup>3</sup> *Wichita & W. R. Co. v. Koch*, 47 Kan. 753.

<sup>4</sup> *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

sioned by the default or neglect of the company and its servants, notwithstanding any notice limiting the liability; but the companies were authorized to make reasonable conditions, adjudged to be such, and a special limitation as to recovery was fixed, unless a higher value is declared upon it, and a percentage might be recovered by the carrier, proof of the value to be made by the shipper. The measure of damages was the value of the goods at the place and at the time of the delivery.<sup>1</sup> The carrier was thus rendered liable for the falling of prices.<sup>2</sup> Where a carrier had been informed of special circumstances that would have increased the value requiring corresponding care, he was liable for a negligent loss.<sup>3</sup> This could not be extended however, to the general laws of business, or profit or wages.<sup>4</sup> The English statute, in using the expression "just and reasonable," adopted the existing rule of law. The right of the common carrier to limit his common law liability by special contract was fully recognized.<sup>5</sup> But, in accord with the great weight of authority in this country, it is held that he cannot contract for exemption, either in whole or in part, from liability for the negligence of himself or his servants; that such an exemption is against public policy, because it would enable him to put off the essential duties of his public employment.<sup>6</sup> The case, therefore, when the limit is as to value, comes down to a question of the construction to be placed on the stipulation. If the purpose of it was merely to place a limit on the amount for which the carrier should be liable, then clearly, as to losses resulting from negligence, it is not just or reasonable, and is not binding on the shipper.

<sup>1</sup> *O'Hanlan v. Great Western R. Co.* 34 L. J. Q. B. 154, 13 Week. Rep. 741; *Rice v. Baxendale*, 30 L. J. Exch. 371.

<sup>2</sup> *Collard v. Southeastern R. Co.* 30 L. J. Exch. 393; *Borries v. Hutchinson*, 34 L. J. C. P. 169.

<sup>3</sup> *Hadley v. Baxendale*, 9 Exch. 341; *Cory v. Thames Iron Works & S. B. Co.* 37 L. J. Q. B. 68.

<sup>4</sup> *Crouch v. Great Northern R. Co.* 11 Exch. 742; *Horne v. Midland R. Co.* L. R. 8 C. P. 131, 42 L. J. C. P. 59.

<sup>5</sup> *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122.

<sup>6</sup> *Christenson v. American Exp. Co.* *supra*; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *Moulton v. St. Paul, M. & M. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191.

Thus, a stipulation that a stallion worth \$5000 is only valued at \$200, is void.<sup>1</sup> But, on the other hand, a fair agreement, in consideration of a reduced freight rate, limiting the carrier's liability to \$50 for injury or death to any animal shipped under the contract, will be enforced, although the value of the animal killed may be \$800.<sup>2</sup> A livestock shipping contract containing a clause that in case of damage the carrier is to pay a certain named amount which, it is agreed, is what the stock is reasonably worth, is not void as against public policy as an attempt by the carrier by contract to exempt itself from liability for its own negligence.<sup>3</sup> One who ships a horse as an ordinary horse, understanding that the carrier has a regulation limiting its liability in case of injury to a certain sum for an ordinary horse, and if a higher value is given a higher rate will be charged, cannot insist upon a higher valuation in case of loss or injury.<sup>4</sup> If it was a stipulation as to the value of the property, fairly and honestly made as the basis of the carrier's charges and responsibility, then it ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. There is no difference between a case where the stipulation is that the value of the property does not exceed a specified sum, and one where the value is stipulated to be a specified sum. It makes no difference whether the valuation expressed in the contract is one previously named by the shipper on requirement of the carrier, or one inserted in the contract by the carrier without being named by the shipper, but acquiesced in by him. In either case it becomes a part of the contract on which the minds of the parties meet, and on which they act. Such a stipulation inserted in the shipping receipt is binding on the shipper if he understands its purpose and knows that the freight charges are proportioned to the nature and extent of

<sup>1</sup> *Baughman v. Louisville, E. & St. L. R. Co.* 14 Ky. L. Rep. 775.

<sup>2</sup> *St. Louis, I. M. & S. R. Co. v. Weekly*, 50 Ark. 397.

<sup>3</sup> *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17.

<sup>4</sup> *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449.

the risk ; and the fact that neither the value of the goods nor the rate of charges is asked in a particular case is immaterial.<sup>1</sup>

A shipper of horses is not relieved from the binding effect of a special contract signed by him fixing their value in case of loss, in consideration of which he obtained reduced rates, by the fact that the contract was not ready for the shipper's signature until he went to get his ticket to enable him to leave on a passenger train, and that he signed the contract hurriedly and without reading it.<sup>2</sup> A statement of the value of a horse shipped, made by the shipper in answer to the carrier's inquiry, which value is inserted in the bill of lading, is conclusive on him as to the value of the horse in an action against the carrier for its loss, although the bill of lading is silent as to the effect of such valuation upon the shipper's liability, and he has no actual information, and did not suppose that his statement would affect the amount of the company's liability.<sup>3</sup> Where a shipper, after putting his horse in a car, asks for a receipt, and, when one containing a contract restricting the liability of the company is shown to him, he signs it without reading it, although there was no reason for his not reading it, he is bound by the provisions of the contract contained there.<sup>4</sup> If the purpose of the stipulation is a lawful and proper one, the mere fact that it may incidentally have the effect of limiting the amount of the carrier's liability in case of loss caused by negligence will not render it invalid. Contracts of this kind relating to the transportation of livestock are very common, and their reasonableness, at least as applied to that class of property, seems quite apparent. Every one may be presumed to know approximately the average value of ordinary domestic animals, and a regulation of a carrier with respect to the transportation of live animals, fixing the ordinary value of horses at \$200, and requiring an extra charge for transporting animals of a greater value, is reasonable and not in conflict with the general rule that a carrier cannot discharge himself of legal responsibility by general

<sup>1</sup> *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453.

<sup>2</sup> *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55.

<sup>3</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>4</sup> *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524.

notice,<sup>1</sup> but it is well known that many animals have a special value because of some peculiar qualities—such as speed or pedigree—which are not apparent from mere inspection. For example, a horse which, to one not acquainted with it might not appear to be worth more than any ordinary horse, might, because of speed, be worth \$10,000. The agents of common carriers are not expected to be, and usually are not, experts as to the special or peculiar value of particular animals. Ordinarily they would know nothing about the matter except what they learned from the shipper's statement. Presumably, the charges for transportation are to a considerable extent based on the value of the property. Moreover, the measure of care on part of the carrier will naturally be commensurate with the value of the property intrusted to him. Consequently the law always required entire good faith on part of the shipper in stating the nature and value of property delivered to a carrier for transportation.

A common carrier is entitled to be fairly informed as to the value of the property confided to his care; and where a shipper enters into an agreement with a carrier as to the value of the property shipped, and receives the benefit of low rates by reason of placing a low valuation upon the property, he is estopped from claiming or recovering another and higher valuation after the loss occurs, although said loss may be the result of negligence on the part of the carrier, provided the same is not gross, wanton, or willful.<sup>2</sup> Even when the common law liability of carriers was enforced most rigorously, the courts always upheld limitations of it, imposed for the purpose of procuring a full disclosure of the value of the property, especially of articles of unusual value, or subject to extra hazard. This is illustrated in that numerous class of cases where packages whose contents were not open to inspection were delivered to an express company or other carrier by the owner, who accepted a receipt therefor containing a condition that in case of loss the holder should not demand beyond a spe-

<sup>1</sup> *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449.

<sup>2</sup> *Zouch v. Chesapeake & O. R. Co.* 17 L. R. A. 116, 36 W. Va. 524; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282.



cified sum, at which the article was thereby valued, unless a greater value was expressed or declared. *Ante* §§ 50-54. But there is no difference in principle between a case where the value of the property is unknown to the carrier because inclosed in a box, and one where it is unknown because dependent on latent qualities not ordinarily ascertainable by inspection. Courts are justified in taking judicial notice of the fact that the maximum values placed by a contract on different kinds of domestic animals are approximately those of average ordinary animals in the country through which the carrier does business. A stipulation in a contract for the shipment of mules in consideration of a reduced rate of freight, that in case of damage to the mules the amount claimed for each mule shall not exceed \$100, is lawful, the amount fixed not being disproportioned to the reduced rate.<sup>1</sup> By executing the contract the shipper stipulates and in effect represents to the carrier that his horses are not worth to exceed an ordinary value each, and that the charges for transportation should be based on that valuation. Assuming that the contract was fairly made for the purposes expressed in it, it ought to be upheld as just and reasonable. It is not in any proper sense a contract for exemption from the consequences of negligence. This view is sustained by the great weight of authority.<sup>2</sup>

In *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, which was an action to recover damages from a railroad for injuries received by the plaintiff's horses during transportation by the defendant as a common carrier, the bill of lading issued by the defendant, and signed by the plaintiff, contained a stipulation that the carrier assumed a liability to the extent of an agreed valuation not exceeding \$200 for each horse, and the rate of freight was based upon that condition, and it was held that even in case

<sup>1</sup> *Western R. Co. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358.

<sup>2</sup> *Alair v. Northern Pac. R. Co.* 19 L. R. A. 764, 53 Minn. 160; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Squire v. New York Cent. & H. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Hill v. Boston H. T. & W. R. Co.* 144 Mass. 284; *South & North Ala. R. Co. v. Hentlein*, 52 Ala. 606, 23 Am. Rep. 578; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 538; *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17; *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449.

of loss or damage by the negligence of the carrier, the contract should be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight received. In that case, the plaintiff claimed and offered to prove that his horses were worth much more than \$200, but it was held that his recovery must be limited to the amount stated in the bill of lading. The basis of the decision was that a common carrier may prescribe just and reasonable regulations to protect himself against fraud, and fix a rate of charges proportionate to the magnitude of the risk he assumes. A shipper cannot claim full value of stock injured during transportation under a contract limiting damages to an agreed valuation, unless upon tender of such contract he demanded one without the limited liability clause.<sup>1</sup> In a late case before the supreme court of New Hampshire, referees found that the plaintiff shipped his horse as an ordinary horse, understanding that the railroad had a regulation limiting its liability in case of injury to \$200 for an ordinary horse, and, if a higher valuation was given, a higher rate would be charged. Knowing that the freight charges were measured by the valuation put upon the property, and that the rate was fixed upon the basis that the liability assumed by the defendant would not exceed \$200 in case of loss or injury, the plaintiff, by shipping his horse as an ordinary horse, it was said, fixed his value for transportation purposes, at \$200, and, having elected to treat his value as \$200 for the purpose of securing a low rate of freight, he cannot insist upon a higher valuation in case of loss or injury. In fixing the freight charges on the assumed valuation of \$200, both parties understood that the liability assumed by the defendant was limited to \$200. The plaintiff's conduct was, in effect, a declaration as to the value of his horse, and an admission that the defendant's liability as carrier would not exceed \$200. The case is as if, upon inquiry by the defendant, the plaintiff had stated the value of his horse to be \$200, the sum named in the defendant's regulation as determining the freight charges, and the liability assumed in the transportation of a horse of ordinary value. The rule or regulation of the defendant, of which the plaintiff

<sup>1</sup> *Louisville & N. R. Co. v. Sowell*, 91 Tenn. 17.

had notice, was not designed and did not purport to relieve the defendant from its common law responsibility as a carrier. The purpose was to secure information as to the value of the animals received for transportation, and compensation proportionate to the risk incurred. As such the regulation was a reasonable one, and not in conflict with the general principle that a common carrier cannot discharge himself of legal responsibility by a general notice.<sup>1</sup> Such a stipulation is not prohibited on grounds of public policy.

In *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 340, 341, 28 L. ed. 717, 721, the court says: "The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be repugnant to the soundest principles of fair dealing, and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss and to repudiate it in case of loss."

There is no injustice in restricting the shipper's claim for damages to the value he places upon his property for transportation. If the plaintiff obtained the lowest rate of freight by shipping his horse as of ordinary value, it is not unreasonable that his recovery should be restricted to \$200, which was the amount of the risk the parties understood the plaintiff paid for and the defendant assumed as carrier.<sup>2</sup> Indeed, it has been ruled that a common

<sup>1</sup> *Moses v. Boston & M. R. Co.* 24 N. H. 71, 90, 91, 55 Am. Dec. 222.

<sup>2</sup> *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449; *Maguin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442; *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 239, 245, 93 Am. Dec. 162; *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284.

carrier is liable for the actual damages to horses injured in transportation, not exceeding the sum named in a stipulation in a contract of shipment limiting its liability and fixing such sum as their value,—though the horses in their damaged condition sold for more than such sum.<sup>1</sup> The ruling is exceptional that a contract by which the liability of a common carrier in the transfer of stock is limited to a designated amount per head is not effective, where damage is caused by the negligence of the carrier.<sup>2</sup>

Where the owner of some horses delivered them to a common carrier for transportation under a contract, signed by him, stating the terms and conditions upon which the property was to be transported, by which it was agreed "that the value of the livestock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, \$100; each ox, \$50; each bull, \$50; each cow, \$30; . . . such valuation being that whereon the rate of compensation to the company for its services and risk connected with said property is based," it was said that assuming that the contract was fairly made for the purposes therein expressed, the sums named being approximately the average values of ordinary domestic animals, this was a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which he receives, and of protecting himself against extravagant valuation in case of loss, and that the recovery of the owner will be limited to the sums named, even though the loss occurred through the negligence of the carrier or his servants.<sup>3</sup> And the rule is generally recognized that a common carrier may, by special agreement, just and reasonable in itself, and fairly made between itself and the consignor of a horse at the time of the shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value of the horse thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided said

<sup>1</sup> *Starnes v. Louisville & N. R. Co.* 91 Tenn. 516.

<sup>2</sup> *Abrams v. Milwaukee, L. S. & W. R. Co.* 87 Wis. 389.

<sup>3</sup> *Alair v. Northern Pac. R. Co.* 19 L. R. A. 764, 53 Minn. 160.

negligence be not gross, wanton, or willful, but cannot wholly exempt itself from liability for loss resulting from negligence.<sup>1</sup>

Questions of fact as to the execution of the contract are for the jury and the question of what was the contract of the parties is properly submitted, and the common law liability of carriers defined, to the jury, in an action against a carrier for the death of stock delivered to it for transportation, where there is evidence on the part of the shipper that the contract was oral, without limitations, and that he subsequently signed what he supposed to be a receipt, of the contents of which he was ignorant, and on the part of the carrier that the paper was the contract,<sup>2</sup> and as a question of law it may be said that a provision of a bill of lading limiting damages for injury to a horse during transportation is waived by a settlement of the damages, in which the horse is taken and a larger sum agreed to be paid therefor.<sup>3</sup> A special contract limiting the liability of a carrier, signed by a shipper of horses after they are aboard the train, upon a demand of the agent of the carrier, combined with a statement that otherwise the horses will not go on that train,—is not binding upon him.<sup>4</sup>

But while exemptions from other causes of accident than negligence may lawfully be stipulated for, in consideration of taking the animals on reduced terms,<sup>5</sup> and a carrier of horses may lawfully stipulate against liability for injuries arising in consequence of their being wild, unruly, or weak, or of different ages or classes, or maiming each other or themselves,<sup>6</sup> yet in case of loss from any cause for which the carrier would be liable at common law, if exemption under contract is claimed, the proof must bring the loss within the exception.<sup>7</sup>

<sup>1</sup> *Zouch v. Chesapeake & C. R. Co.* 17 L. R. A. 116, 36 W. Va. 524.

<sup>2</sup> *St. Louis & S. F. R. Co. v. Clark*, 48 Kan. 321.

<sup>3</sup> *Chicago & E. I. R. Co. v. Katzenbach*, 118 Ind. 174.

<sup>4</sup> *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210.

<sup>5</sup> *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284; *Morrison v. Phillips & C. Const. Co.* 44 Wis. 405, 28 Am. Rep. 599; *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 243, 93 Am. Dec. 162; *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115.

<sup>6</sup> *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418.

<sup>7</sup> See *ante*, § 49.

In an action to recover damages for injuries to a horse which had been delivered to the defendant carrier for transportation, where the injuries were alleged to have been caused by the carrier's negligence, the carrier on the trial introduced the bill of lading in this form: "Housatonic Railroad. Great Barrington Station. April 25, 1891. In consideration of the Housatonic Railroad Co., and also in consideration of any corporation whose roads connecting therewith, receiving and carrying, viz, one horse, value \$100; one colt, consigned to Rundle & White, Danbury, Conn., freight prepaid, the owner and shipper hereby agree that none of said corporations shall be liable for damage or loss of or to all or any part of said freight by reasons of breaking, chafing, weather, fire, or water, except where collision or running from the track, resulting from negligence of the corporation's agents, shall cause the same; and the shipper and owner hereby promise to pay the freight, and to claim no deduction therefrom by reason of any damage or loss. L. F. Jones, Station Agent. Signed in duplicates: Parley A. Russell, Agent for shipper and owner."

The defendant requested the court to charge the jury that, inasmuch as the declaration charges the defendant merely as a common carrier, but the proof is that the mare and colt were shipped under a special contract, the proof does not support the declaration, and the verdict must be for the defendant. This the court declined to do, but charged that, in view of the complaint, and of all the pleadings, and of the evidence offered by the plaintiff, the suit was to be regarded as an action to recover of the defendant upon the ground of its negligence. The refusal of the court to charge as requested by the defendant was held on appeal fully justified. If the animals had been shipped under a special contract, which undertook to completely exonerate the defendant from the consequences of its own negligence, the request would have been proper. But in this case it is said there is no attempt on the part of the defendant to limit its common law liability except by reason of breaking, chafing, weather, fire, or water, where collision or running from the track, resulting from negligence of the corporation's agents, does not cause the same.

It is argued by the defendant that the injuries which the mare sustained and which occasioned her death, namely, the breaking of a leg, and other severe injuries occasioned by her being thrown down by a sudden side movement of the car, are properly described by the words "breaking" and "chafing" in the bill of lading, and are therefore injuries against which the defendant undertook to exempt itself from responsibility, even for its own negligence, unless such negligence caused collision or running from the track, which, in this case, it did. Such an argument, in the judgment of the court, is unsound. None of the words, "breaking, chafing, weather, fire, or water," used in the bill of lading to describe the occasion of the damage against which the defendant limits its liability, are apt or appropriate to describe the injuries complained of, nor injuries to live freight at all. It is evident the bill of lading used on this occasion was one ordinarily used for goods, wares, and merchandise, other than living animals, or, at any rate, was only appropriate for such property. In *Camp v. Hartford & N. Y. S. B. Co.* 43 Conn. 333, twelve barrels of sugar and one tierce of rice were shipped under a bill of lading, which contracted to transport and deliver them in the order and condition in which received, the acts of God, public enemies, perils of sea and river navigation, collision, fire, and all other perils, dangers, and accidents not resulting from the negligence of the company or its agents, excepted." On the passage through Hell Gate the steamboat struck on a rock and sprung a leak, whereby the goods were damaged. The plaintiff sued the steamboat company as common carriers, and himself introduced the bill of lading in evidence. The defendants claimed and requested the court to instruct the jury that the contract between the parties, upon which they were alone liable, if at all, was expressed in the bill of lading, and that it was the duty of the plaintiff to set out in his declaration the contract and the exceptions as to liability as contained therein; that there was a variance between the declaration and the proof, and that the plaintiff, therefore, could not recover; and that the goods were received by the defendants not as common carriers, but under the contract contained in the bill of lading. The court de-

clined so to instruct the jury, but instructed them that the plaintiff might recover, unless the defendants showed that the accident occurred through no want of reasonable care or prudence on their part. Upon a motion for a new trial for error in refusing to charge as requested, this court held that there was a fatal variance between the allegations of the declaration and the proof. It held it to be well settled that common carriers may stipulate for a less degree of responsibility than the common law imposes, and that, while the English courts hold that they may stipulate for entire exemption, even for their own negligence, the courts in this country differ only as to the extent to which public policy will allow the stringency of the ancient rule to be relaxed, and generally hold that they will reserve the right to pass upon the reasonableness of the particular contract made, and will not allow the carrier to exempt himself by special contract from the consequences of his own negligence or that of his agent. That case, however, it is said, differs from the case at bar. To be sure, the bill of lading in the latter undertakes to exempt the defendant from responsibility for all damage to freight by reason of breaking, chafing, weather, fire or water, even though occasioned by its negligence, other than negligent collision or running off the track; and in respect to freight to which that contract applied we should hold that the contract for exemption from consequences of its own negligence could not be sustained. But the court say there is no contract that the defendant shall be exempted from damages occasioned by its own negligence in failing to provide a suitable car, or for so transporting a mare that she is thrown down so as to break her leg, and receive other severe injuries, of which she dies. In respect to every injury except those caused by breaking, chafing, weather, fire, or water, or by collision or running off the track through the negligence of its agents, the defendant is subject to all the responsibilities of a common carrier. No attempt is made to limit such responsibilities. The bill of lading contains no contract respecting them.

The common law rule which made carriers practically insurers of property while being carried by them has, however, it is admitted from the very necessity of the case, been in a measure



relaxed in the carriage of livestock. As suggested in Edwards on Bailments, § 680, the carrier can store away goods, so as to secure their safety; but a carrier of animals by a mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright; they may, notwithstanding every precaution, destroy themselves in attempting to break away from the fastenings by which they are secured; or they may kill each other by crowding, plunging, or goring; the motion of the cars, their frequent concussions, the scream of the engines may often create a kind of frenzy in the swaying mass of cattle; and the carrier is not held liable for injuries or losses arising from the irrepressible instincts of this living freight which he could not prevent by the exercise of reasonable care. While he is not an insurer against injuries arising from the nature and propensities of the livestock carried by him, yet his liability is not limited to a careful conveyance of the cars containing them. He must provide, in advance, suitable means to secure their conveyance; and he must use those means with all reasonable diligence and forethought in the varying circumstances arising in the business. In applying these principles to the case pending, it is said that the plaintiff sued the defendant as a common carrier of livestock. The defendant, as one defense, set up the bill of lading, and claimed that the mare and colt were shipped under its special provisions, which varied its ordinary liability, and therefore the proof did not support the declaration. The plaintiff claimed in reply that the injuries named in the bill of lading for which the defendant undertook to limit its liability did not refer to injuries to livestock at all, and, if they did, no exemption was provided for the injuries complained of, and therefore, in respect to the care required in transporting and to injuries of the nature of and occasioned as those in question, the defendant took the mare and colt as common carriers simply and not under a special contract. If this was true, there is no variance. The facts do not present a question of technical variance. The plaintiff does not set out one contract in his complaint and prove another. He claims to recover against the defendant as a common carrier, and introduces no proof inconsistent with such claim, and insists that

the proof introduced by the defendant is not inconsistent with that claim. It is a question of construction of the contract contained in the bill of lading, and it is held that the court was right in instructing the jury that there was no such variance between the allegations and the proof as required a verdict for the defendant. The question was whether the bill of lading, properly construed, prevented the plaintiff from recovering from the defendant under its common law liability as a carrier of live stock. The court thought it did not, and this ruling was approved on appeal.<sup>1</sup>

A general allegation that an act was done negligently is sufficient without stating in detail the specific acts constituting the negligence.<sup>2</sup> An action of tort against a carrier for injury to live stock shipped, through breach of the carrier's legal duty and through negligence, may be maintained, notwithstanding the existence of a special contract of shipment of such stock limiting the liability of the carrier, but not against liability for negligence.<sup>3</sup> A carrier making a through contract for the shipment of stock over its own and a connecting line may limit his liability to its own line,<sup>4</sup> but a stipulation in a contract for the shipment of livestock, exempting the carrier from liability for any injuries or damage to the stock occurring on other lines, does not exempt it from liability for damages occurring on one of a system of roads operated by it.<sup>5</sup> A contract with a carrier to which horses are first delivered for shipment to a point on the line of another carrier, limiting liability for injury to them, does not enure to the benefit of the latter carrier, where it repudiates the contract, requires the execution of a new contract, and collects additional freight.<sup>6</sup> A bill of lading containing fifteen sections limiting the carrier's common law liability, required to be accepted by a shipper as a condition of receiving and carrying his stock, is invalid as unfair and unrea-

<sup>1</sup> *Coupland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>2</sup> *Hindman v. Timme* (Ind. App.) Dec. 20, 1893.

<sup>3</sup> *Nicoll v. East Tennessee, V. & G. R. Co.* 89 Ga. 260.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Thompson* (Tex. Civ. App.) Feb. 8, 1893.

<sup>5</sup> *International & G. N. R. Co. v. Anderson* 3 Tex. Civ. App. 8.

<sup>6</sup> *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210.

sonable; and an intermediate carrier can claim no more rights thereunder than could have been claimed by the initial carrier.<sup>1</sup> There are conflicting decisions usually resulting from statutes in the states as to the right to limit the value to that existing at the place of shipment. It has been decided that a contract for the shipment of livestock, which attempts to fix the measure of damages by the value of the animals at the point of shipment, instead of the place of destination, is unreasonable, and will not be enforced.<sup>2</sup> And that a carrier cannot restrict its liability for damages for its own negligence to less than the true value of the property by a provision that in case of loss the value at the place of shipment shall be the measure of damages.<sup>3</sup>

But it has been also held that a stipulation that the value of the goods shall be estimated at the place of shipment, is valid.<sup>4</sup> Of course a mere custom requiring a shipper to agree, as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment, is illegal.<sup>5</sup>

A contract for the shipment of livestock by a railroad company provided that, in consideration of a certain reduced rate of transportation, the owner of said stock should assume all risks of injuries which the animals or either of them might receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming and killing themselves or each other, or from delays, or in consequence of heat or suffocation, or the ill effects of being crowded upon the cars of said company, or on account of being injured by the burning of hay, straw, or any other material used by the owner in feeding the stock, or otherwise, and any damage occasioned thereby, and also all risk of any loss or damage which might be sustained by reason of any delay, or from any other cause or thing in or incident to, or from, or in, the loading or unloading of said stock; that said owner should load and unload said

<sup>1</sup> *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127.

<sup>2</sup> *International & G. N. R. Co. v. Anderson*, 3 Tex. Civ. App. 8.

<sup>3</sup> *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 104, 49 Am. & Eng. R. Cas. 157.

<sup>4</sup> *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 314, 29 L. ed. 873.

<sup>5</sup> *Missouri Pac. R. Co. v. Fagan*, 2 L. R. A. 75, 72 Tex. 127.

stock at his own risk, the railroad company furnishing the necessary laborers to assist, under the direction and control of said owner, who should examine for himself all the means used in loading and unloading, to see if they were of sufficient strength, of the right kind and in good repair and order; that each person riding free to take care and charge of said stock should do so at his own risk of personal injuries from whatever cause; and that the owner should release and hold harmless, and keep indemnified, the railroad company from all damages, actions, claims, and suits, on account of any and every injury, loss and damage heretofore referred to, if any should occur or happen. In a subsequent suit against the railroad company, a recovery was sustained on appeal, for certain animals shipped by the plaintiff, under this contract, and lost, while in course of transportation, by escaping through a window open in the end of the car in which they had been loaded by the plaintiff's agent, who accompanied them on the route, and who, after the escape of one of the animals, told the conductor to fix said window, and the conductor not doing so, fixed it himself.<sup>1</sup> The owner of a horse shipped in a box car, the doors of which can be fastened only from the outside, and who is inside the car with the horse, has a right to expect that the conductor will see that the door is properly closed and fastened before starting the train, although the horse is shipped under conditions by which the owner assumes all risk of loading, transportation, and unloading, except from negligence of the railroad employes.<sup>2</sup> There are many cases which are cited in a preceding section (50) which refer as well to the questions herein discussed, and to them reference is made.

In some of the states express provisions are contained in their constitution or laws forbidding limitations of liability. Thus, the effect of section 4 of article 11 of the Constitution of Nebraska which provides that "the liability of railroad corporations as common carriers shall never be limited," was to put it out of the power of railroads as common carriers to limit their liability, as such, by special agreements with shippers; and thus remove from

<sup>1</sup> *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394.

<sup>2</sup> *Lavoie v. Reg.* 3 Can. Exch. 96.

their officers and agents all temptation to effect said exemption from liability, and the loss and damage to property which might, of necessity, follow the release of their responsibility and that of their agents therefor.<sup>1</sup> And hence a livestock contract entered into for this purpose is void,<sup>2</sup> and a carrier of livestock cannot by contract with a shipper relieve itself, either in whole or in part, from liability for injury or loss arising from its own negligence.<sup>3</sup> And the regulations that the Crown should be relieved from liability for livestock shipped over government railways, made a part of Can. Rev. Stat. chapter 38, of which § 50 provides that the Crown shall not be relieved of liability where damage is occasioned by negligence of its employes, do not operate to relieve the Crown of liability where the loss arises from such negligence.<sup>4</sup>

### § 72. *Contributory Negligence of Shipper.*

In the case of the common carrier of freight, as in that of the carrier of passengers, negligence contributing to the injury of the party suffering loss, will relieve the carrier, although he has also been guilty of negligence, except in one or two states where the doctrine of comparative negligence is recognized. Thus any neglect to inform the carrier of the value or peculiar temperament of an animal, or of the worth or character of a package, which should have more than ordinary care will relieve the carrier from neglect to give such special care, unless the nature or value appear otherwise.<sup>5</sup> A carrier is not liable for the death of a bull calf from overaction and overheating at the time of unloading him from a car because it was done at the depot platform at which single head of cattle were usually unloaded instead of at the stock yard, where the unruly disposition of the calf, which caused the trouble, was not

<sup>1</sup> *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117.

<sup>2</sup> *Missouri Pac. R. Co. v. Vandeverter*, 3 L. R. A. 129, 26 Neb. 222.

<sup>3</sup> *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275.

<sup>4</sup> *Lavoie v. Reg.* 3 Can. Exch. 96.

<sup>5</sup> *Hayes v. Wells*, 23 Cal. 185, 83 Am. Dec. 89; *Fargo & Co. Magnin v. Dinsmore*, 62 N. Y. 35, 20 Am. Rep. 442, 70 N. Y. 410, 26 Am. Rep. 608; *Mechanics & T. Bank v. Gordon*, 5 La. Ann. 604; *Southern Exp. Co. v. Everett*, 37 Ga. 688.

known until he was taken from the car.<sup>1</sup> Of course active deceit, as concealing the contents or character of the article sent, will require actual negligence on the part of the carrier to sustain a recovery—as, concealing money therein,<sup>2</sup> or falsely marking to indicate a different kind of care from that actually required,—as marking “glass” on a case of jewelry.<sup>3</sup> So error of the shipper as to direction for delivery of the shipment or failure to notify consignee will relieve the carrier of liability, unless he be guilty of actual negligence which causes the failure to deliver.<sup>4</sup> The allegation in a complaint for negligence, that the plaintiff was free from fault, renders the complaint good against an inference of contributory negligence, unless the inference arises as a necessary legal conclusion from the facts particularly stated.<sup>5</sup>

If the owner assume to direct the shipment he will relieve the carrier from responsibility for loss he may thus cause,<sup>6</sup> but not where the carrier controls his efforts.<sup>7</sup> Under a contract for transportation of a horse, restricting the liability of the company for any loss “by jumping from the cars,” the owner cannot recover on the ground of the negligence of the company, where he himself put the horse in the car, tied him near a window, opened the window, and left it open, just before the car was to start.<sup>8</sup> If the failure of a shipper of a carload of mules to accompany and attend them, under the contract of shipment, in which he agreed, in consideration of a free passage, to attend, feed, and water them at his own risk and expense, proximately contributed to an injury to the mules, the company is not liable therefor.<sup>9</sup>

<sup>1</sup> *Chicago, B. & Q. R. Co. v. Owen*, 21 Ill. App. 339.

<sup>2</sup> *Gibbon v. Paynton*, 4 Burr. 2298.

<sup>3</sup> *Relf v. Rapp*, 3 Watts & S. 21, 37 Am. Dec. 528. See also *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808; *Crouch v. London & N. W. R. Co.* 14 C. B. 255. See *ante*, § 53.

<sup>4</sup> *Southern Exp. Co. v. Kaufman*, 12 Heisk. 161; *Mahon v. Blake*, 125 Mass. 477; *Ross v. Missouri, K. & T. R. Co.* 4 Mo. App. 582; *Wise v. Great Western R. Co.* 1 Hurlst. & N. 63; *Forsyth v. Walker*, 9 Pa. 148.

<sup>5</sup> *Pittsburgh, C. C. & St. L. R. Co. v. Bennett* (Ind. App.) Nov. 28, 1893.

<sup>6</sup> *Rogers v. Wheeler*, 52 N. Y. 262; *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42.

<sup>7</sup> *Powell v. Pennsylvania R. Co.* 32 Pa. 414, 75 Am. Dec. 564; *Philleo v. Sanford*, 17 Tex. 227, 67 Am. Dec. 654.

<sup>8</sup> *Hutchinson v. Chicago, St. P. M. & O. R. Co.* 37 Minn. 524.

<sup>9</sup> *Western R. Co. v. Hurdell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358.

A railroad company is under no obligation to a shipper of livestock, under a contract providing that he may accompany and care for it *in transitu*, to stop the train at the station platform to permit him to board it, where its usual custom is for shippers to board the train in the yard, and he, without inquiry as to when or from what place the train will start, goes to a restaurant to get a lunch, and proceeds to the platform.<sup>1</sup> A railroad company is not liable for injuries caused by negligence in loading livestock drawn over its road in a car owned and loaded by the owner of the stock, though it is the general duty of its conductors to see that trains under their control are properly loaded.<sup>2</sup> But knowledge of the unsafe condition of a platform provided by a carrier for loading stock will not prevent recovery for injuries to a person on attempting to use it for that purpose in the exercise of due care.<sup>3</sup>

<sup>1</sup> *Ohio & M. R. Co. v. Brown*, 46 Ill. App. 137.

<sup>2</sup> *Fordyce v. McFlynn*, 56 Ark. 424.

<sup>3</sup> *White v. Cincinnati, N. O. & T. P. R. Co.* 7 L. R. A. 44, 89 Ky. 478.

## CHAPTER IX.

### PACKING AND STOWING GOODS.

- § 73. *Duty of Carrier and Shipper—Clean Bill of Lading.*
- § 74. *Custom Controlling Stowage. See ante, § 33.*
- § 75. *Stowage of Goods on Deck.*
- § 76. *Owner's Knowledge of Improper Stowage—Owner's Risk.*
- § 77. *Negligence in Stowage and Handling.*
- § 78. *Jettison.*

#### § 73. *Duty of Carrier and Shipper—Clean Bill of Lading.*

The common carrier is an insurer of the property carried, and the duty rests upon it to see that the packing and conveyance are such as to secure its safety.<sup>1</sup> The owner of a vessel is liable for the failure to use due care in stowing the cargo, and in navigating the vessel. This obligation to use due diligence and skill in stowing and staying the cargo, does not amount to a warranty that it has been done through their sanction. The want of additional supports of a deck, if they would not have enabled the ship to carry the load through a storm, is not a ground of recovery. In stowing goods, the possibility of heavy weather must be considered and duly provided against, and part of the cargo which may be affected thereby and lost, must be stowed with special care.<sup>2</sup>

The carrier is not responsible, however, where goods are destroyed or injured from some inherent quality in the goods themselves,<sup>3</sup> nor is it liable for injury or damage to goods from insecure or imperfect packing or boxing, for the shipper of goods perishable in their nature or susceptible of easy breakage, must take

<sup>1</sup> *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423.

<sup>2</sup> *The Maggie M.* 30 Fed. Rep. 692.

<sup>3</sup> *Alston v. Herring*, 11 Exch. 822.



extra care in packing and boxing.<sup>1</sup> A carrier will be presumed to have received goods in good order, in the absence of evidence to the contrary.<sup>2</sup> An answer by a carrier sued by a consignee for a failure to deliver goods which it agreed to transport to him at a certain destination, setting up negligence on the part of the owner and consignor in the mode of loading the goods on the car, is bad where it does not allege that such fault of the owner was the sole cause of the loss of the goods, contributory negligence on the owner's part not being a valid defense.<sup>3</sup>

Text-writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between a carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts.<sup>4</sup> The recital in a bill of lading that the goods were received "in apparent good condition" refers only to the external condition, and as between the parties is only *prima facie* proof of the true condition when received.<sup>5</sup>

While the general rule requires that goods, unless they are such as may safely be carried on deck, should be stowed below, this rule is usually held to apply to sea going vessels not propelled by steam,<sup>6</sup> and is not generally accepted, either by law or custom, as controlling the stowage of goods upon inland navigation. It has

<sup>1</sup> *Goodman v. Oregon R. & Nav. Co.* 22 Or. 14, 49 Am. & Eng. R. Cas. 87.

<sup>2</sup> *Henry v. Central R. & Bkg. Co.* 89 Ga. 815.

<sup>3</sup> *McCarthy v. Louisville & N. R. Co.* (Ala.) Dec. 22, 1893.

<sup>4</sup> *Hustings v. Pepper*, 11 Pick 42; *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Ellis v. Willard*, 9 N. Y. 529; *Muy v. Babcock*, 4 Ohio, 346; *Adams v. Royal Mail S. Packet Co.* 5 C. B. N. S. 492; *Sick v. Ford*, 13 C. B. N. S. 100; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>5</sup> *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279.

<sup>6</sup> *Toledo F. & M. Ins. Co. v. Speares*, 16 Ind. 52; *Merchants & M. Ins. Co. v. Shillito*, 15 Ohio St. 559, 86 Am. Dec. 491; *Hurley v. Milward*, 1 Jones & C. 224.

been held not to apply to a steamer upon Long Island Sound,<sup>1</sup> nor upon the Great Lakes to a sailing vessel.<sup>2</sup> The rule, however, has been recognized as controlling stowage on sailing vessels upon the lakes.<sup>3</sup>

The bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. In so far as it is a receipt, it may be contradicted by oral testimony; so far as it is a contract between the parties, it stands on a footing with all other contracts in writing, and cannot be contradicted nor varied by parol evidence.<sup>4</sup> Unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability in case of loss, by virtue of the exception of dangers of the seas, unless the dangers are such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment.<sup>5</sup> If the bill of lading is silent as to the mode of stowing the goods, it imports that the goods are to be carried under deck, and parol evidence that the shipper agreed that the goods should be stowed on deck, cannot be received.<sup>6</sup>

Though by its terms the common or "clean" bill of lading is silent as to the stowage, yet it imports that the goods are to be safely stowed under deck; and this is a condition tacitly annexed

<sup>1</sup> *Harris v. Moody*, 30 N. Y. 266, 86 Am. Dec. 375.

<sup>2</sup> *Gillett v. Ellis*, 11 Ill. 579.

<sup>3</sup> *The Milwaukee Belle*, 2 Biss. 197.

<sup>4</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>5</sup> *The Rebecca*, 1 Ware. 210; *Dodge v. Bartol*, 5 Me. 286, 17 Am. Dec. 233; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Taunton Copper Co. v. Merchants Ins. Co.* 22 Pick. 108; *Adams v. Warren Ins. Co.* 22 Pick. 163; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>6</sup> *The Delaware v. Oregon Iron Co.* *supra*; *The Star of Hope v. Church*, 84 U. S. 17 Wall. 651, 21 L. ed. 719.

to the contract by law. And this implied contract is so conclusive that the law will not permit parol evidence to show that the parties contracted for a stowage on deck.<sup>1</sup> This is settled law, that a clean bill of lading in courts, imports that goods are to be safely and properly stowed under deck, and that it is a duty of the master to see that the cargo is so stowed and arranged, that the different goods may not be injured by each other, or by the motion or leakage of the vessel, unless by agreement, that service is to be performed by the shipper.<sup>2</sup> Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a "clean" bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies.<sup>3</sup>

#### § 74. *Custom Controlling Stowage.* See ante, § 33.

Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contracts in matters upon which the contract is silent, but it is never admitted to make a contract or to add a

<sup>1</sup> *Creery v. Holly*, 14 Wend. 26; *The Waldo*, 2 Ware, 167; *The Delaware v. Oregon Iron Co.* *supra*.

<sup>2</sup> *The Delaware v. Oregon Iron Co.* *supra*; *The Niagara v. Cordes*, 62 U. S. 21 How. 23, 16 L. ed. 46; *Sandeman v. Scurr*, L. R. 2 Q. B. 98; *Swainston v. Garrick*, 2 L. J. Exch. N. S. 355; *Anglo-African Co. v. Lamzed*, L. R. 1 C. P. 229; *Alston v. Herring*, 11 Exch. 822.

<sup>3</sup> *Abbott, Shipping* (7th Am. ed.) 345; *Smith v. Wright*, 1 Cai. 43, 2 Am. Dec. 162; *Gould v. Oliver*, 2 Maule & G. 208; *Waring v. Morse*, 7 Ala. 343; *Falkner v. Earle*, 3 Best. & S. 363.

new element to the contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.<sup>1</sup> In a case where evidence was excluded of the owner's knowledge of stowage of goods on deck, the court admitted that where there is a well known usage, in reference to a particular trade, to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo should be carried in the usual manner.<sup>2</sup> It is said that remarks are found in the opinion of the court in the case of *Vernard v. Hudson*, 3 Sumn. 406, and in *Sayward v. Stevens*, 3 Gray, 101, which permitted the introduction of parol evidence; but the weight of authority and all the analogies of the rules of evidence is against giving effect to the language there implied.<sup>3</sup>

The question of negligence in stowage should be governed by the custom of trade, and if the case were stowed according to the customary way in that particular trade—there being no special directions otherwise—the vessel would not be liable.<sup>4</sup> A vessel under special charter, and not engaged as a common carrier, is not liable for damages to grain stored against an iron bulkhead abaft the engine room, caused by heat, where the storage was in accordance with the usual custom of the country in which it was done, and was approved by persons whose business it is to supervise and determine what is proper stowage.<sup>5</sup>

<sup>1</sup> *Oelricks v. Ford*, 64 U. S. 23 How. 63, 16 L. ed. 538; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987; *Simmons v. Law*, 3 Keyes, 219; *Spartali v. Benecke*, 10 C. B. 222; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>2</sup> *Sproat v. Donnell*, 26 Me. 187, 45 Am. Dec. 103; *Hope v. State Bank*, 4 La. 212; *Lapham v. Atlas Ins. Co.* 24 Pick. 1; *Barber v. Brace*, 3 Conn. 13, 8 Am. Dec. 149, 2 Taylor, Ev. §§ 1062, 1067.

<sup>3</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>4</sup> *Blaikie v. Stembridge*, 5 Jur. N. S. 1128.

<sup>5</sup> *The Dan*, 40 Fed. Rep. 691.

### § 75. *Stowage of Goods on Deck.*

The rule is equally imperative, however, that goods which are liable to suffer injury from being stowed in the hold, must be stowed upon deck; and the carrier must take notice of this necessity.<sup>1</sup> Thus, in view of the practice as to the stowage of nuts shipped from New York to San Francisco, from the well known fact that, if stowed in the hold, they are liable to be injured by sweat, it is culpable negligence on part of the carrier to stow them in the hold.<sup>2</sup> Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee, unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowing did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law.<sup>3</sup> Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he failed to do so, the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow, if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea, or from the necessary exposure of the property, but the burden to prove

<sup>1</sup> *The New Orleans*, 26 Fed. Rep. 44.

<sup>2</sup> *The Star of Hope v. Church*, 84 U. S. 17 Wall. 651, 21 L. ed. 719.

<sup>3</sup> *Lawrence v. Minturn*, 58 U. S. 17 How. 114, 15 L. ed. 64; *The Peytona*, 2 Curt. 23; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact.<sup>1</sup>

### § 76. *Owner's Knowledge of Improper Stowage—Owner's Risk.*

A bill of lading which contains no stipulation as to the stowage of the merchandise carries with it the implied obligation of the carrier if the goods are shipped by water, to stow them securely under deck,—unless there be a general custom authorizing the carriage of that particular class of goods on deck. And the owner's knowledge that the goods are not stowed below deck, will not avail to protect the carrier otherwise.<sup>2</sup> Contracts of the master, within the scope of his authority as such, bind the vessel and give the creditor a lien upon it for his security except for repairs and supplies purchased in the home port and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfill that duty, he is responsible for the safety of the goods, and if they are sacrificed for the common safety, the goods stowed under deck do not contribute to the loss.<sup>3</sup> Ship owners, in a contract by a bill of lading for the transportation of merchandise, take upon themselves the responsibility of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to carry the goods on deck, by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter, he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law.<sup>4</sup> Although the consent of a shipper is presumed to the taking of such cargoes if proved to be customary,

<sup>1</sup> *Shackleford v. Wilcox*, 9 La. 38; *The Delaware v. Oregon Iron Co.* *supra*.

<sup>2</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779; *The New Orleans*, 26 Fed. Rep. 44; *Creery v. Holly*, 14 Wend. 26; *The Waldo*, 2 Ware, 161.

<sup>3</sup> *The Paragon*, 1 Ware, 329, 331, 2 Phil. Ins. § 704; *Brooks v. Oriental Ins. Co.* 7 Pick. 259.

<sup>4</sup> *The Waldo*, 2 Ware, 162; *Blackett v. Royal Exch. Assur. Co.* 2 Crompt. & J. 250; 1 Arn. Ins. 69; *Lenox v. United Ins. Co.* 2 Johns. Cas. 178; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

to the point of destination, this presumed assent would not justify the master in taking on board hoops apparently unfit from weight or want of seasoning, but the master is responsible for the cargo's apparent condition only, and not for its secret vices or defects. Where the master supposed that the goods were the property of the charterer who employed the stevedore, although the presentment of bills of lading by other persons as owners of the flour and provisions may have been a surprise, where there was still opportunity before he sailed for the discharge of his duty to the shippers and to the ship as respects the stowage of the flour in the place most suitable for it, he was not liable to the shippers for improper stowage, no matter by whom the stevedore was employed, or whoever may have been the liable person, if the master's mate retained the same control over the disposition of the cargo.<sup>1</sup> Where a charter party provides that the vessel is to be loaded by a stevedore selected by the charterer, but paid by the ship and under the exclusive direction of the master, the charterer not to be responsible for stowage, the latter cannot be held liable for her carrying an insufficient cargo in consequence of bad stowage.<sup>2</sup> Where the charterer induced the master, against his objection, to receive a car of lard in leaking casks, the ship is exempt from liabilities between its charterers and owners for damages therefrom, and the transportation of the cargo.<sup>3</sup>

### § 77. *Negligence in Stowage and Handling.*

If costly mirrors are stowed among loose articles of hardware, or, if a case enclosing valuable statuary and marked "this side up with care," is placed up side down among a lot of pig-iron, the carrier could hardly contend that he is protected from liability by the clause exempting dangers of the sea. In the matter of stowage—as in all others—due care, and its opposite, negligence, are relative terms, having respect to the nature of the duty to be performed, the knowledge communicated to the party to be

<sup>1</sup> *The Keystone*, 31 Fed. Rep. 412.

<sup>2</sup> *Manchisa v. Card*, 39 Fed. Rep. 492.

<sup>3</sup> *Boyd v. Moses*, 74 U. S. 7 Wall. 316, 19 L. ed. 192.

charged, and the prevailing usage of the business.<sup>1</sup> The stowage of cases of household goods at the side of the lower hold of a vessel liable to incur unusual leakage and of great breadth for her size, with knowledge of their contents, is negligence on the part of the master which will make the ship liable for damage to the goods by water, notwithstanding a provision of the bill of lading that she shall not be accountable for breakage or damage.<sup>2</sup>

Even where it appeared that the shipper or his agent, delivered the goods to the carrier, and repeatedly saw them as they were stowed on the deck, and made no objection to their being so stowed, it was held that the evidence of this fact was not admissible to vary the legal import of the contract of shipment. That the bill of lading being what is called a "clean" bill of lading, it bound the owners of the vessel to carry the goods under deck.<sup>3</sup>

Although goods are shipped at the owner's risk, the carrier may be liable for damages caused by the weather or rust, if occasioned by the carrier's negligence, or by unreasonable delay on the road. If a shipper of machinery agrees that it may be transported on open cars, the carrier may still be liable for damage by rust or weather, during a detention on the road, if ordinary diligence require the carrier to cover the cars during such detention, and it fails to do so.<sup>4</sup> Where goods, if stowed in the hold, were liable to be injured by sweat and marked "In Cabin State Room," it was culpable negligence to stow them in the hold. Where the bill of lading does not specify any particular place for the stowage of the goods, they are properly stowed between decks in the hold.<sup>5</sup>

The obligation of the shippers of the cargo of a vessel is to be determined by the law of the place where the contract of affreightment is made, although the vessel is owned by a subject

<sup>1</sup> *Lamb v. Parkman*, 1 Sprague, 343; *The Star of Hope v. Church*, 84 U. S. 17 Wall. 651, 21 L. ed. 719; *Hastings v. Pepper*, 11 Pick. 41.

<sup>2</sup> *The Johanne*, 48 Fed. Rep. 733.

<sup>3</sup> *Sproat v. Donnell*, 26 Me. 187, 45 Am. Dec. 103; *Hope v. State Bank*, 4 La. 212; *Lapham v. Atlas Ins. Co.* 24 Pick. 1; *Barber v. Brace*, 3 Conn. 13, 8 Am. Dec. 149; 2 Taylor, Ev. §§ 1062, 1067.

<sup>4</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522.

<sup>5</sup> *The Star of Hope v. Church*, 84 U. S. 17 Wall. 651, 21 L. ed. 719.



of another country.<sup>1</sup> A stipulation in a contract relieving a carrier from liability for the negligence of its servants, if valid by the *lex loci*, will be enforced by the *lex fori*.<sup>2</sup> A provision in a charter that no claim is to be made against owners for loss of cargo, adjusting the liability between the owners and the charterers does not relieve the ship from liability to a shipper of cargo from loss by reason of bad storage.<sup>3</sup> A provision of a bill of lading exempting the carrier from damage from any act, neglect, or default of the pilot, master, or mariners, in the navigation or management of the ship, does not protect the owners from liability for injury to the cargo from negligence of the stevedore.<sup>4</sup> To relieve a vessel acting as a common carrier from liability to bona fide purchasers and consignees for injury to goods from leakage of other goods through imperfect packages or stowing, such liability must be expressly excepted in the bill of lading, even though the goods are shipped by the charterers.<sup>5</sup> An exemption in a bill of lading, not accountable for rust, does not exempt from responsibility for damage caused by improper stowage.<sup>6</sup> A vessel is liable for damage to a cargo of ice, caused by the escape of steam from a defective drip valve.<sup>7</sup> A ship is bound to provide whatever means are necessary to keep the hold free from water, no matter how the leak happens. Unless it is shown that the leak was caused by a peril of the sea, its existence proves negligence.<sup>8</sup> It is the duty of a vessel taking abroad a cargo of molasses in casks, to stow it properly and securely in the place selected; and if supporting stanchions to divide the weight of the casks are needed for security in ordinarily rough weather, it is bound to provide proper stanchions.<sup>9</sup> Where piles of corkwood were bound on board a ship for con-

<sup>1</sup> *China Mut. Ins. Co. v. Force*, 142 N. Y. 90.

<sup>2</sup> *O'Regan v. Cunard SS. Co.* 160 Mass. 356.

<sup>3</sup> *The Centurion*, 57 Fed. Rep. 412.

<sup>4</sup> *The Ferro* [1893] Prob. 38.

<sup>5</sup> *The H. G. Johnson*, 48 Fed. Rep. 696.

<sup>6</sup> *Delekam v. Vose*, 3 Blatchf. 44; *The Invincible*, 3 Sawy. 176.

<sup>7</sup> *The Saugerties*, 44 Fed. Rep. 625.

<sup>8</sup> *The Samuel E. Spring*, 29 Fed. Rep. 397.

<sup>9</sup> *The Centurion*, 57 Fed. Rep. 412.

shipment, and piled for the purpose of proper stowage, and the different kinds of wood were thereby mixed, causing a loss in the market value of the whole, and on arrival in port the shipper sold the goods on the consignee's refusal to give a receipt for the same in good order, the consignee was entitled to recover the value of the shipment, less the freightage.<sup>1</sup>

Whatever the practice may have been when the carriage of green fruit was new, its liability to cause damage from rotting, heating, sweating or decay, through the contingencies of the voyage, were so well known in 1885 that the stowage of macaroni in the same compartment with green fruit was not an exercise of such reasonable care as would relieve the vessel from liability under the bill of lading which excepted "damages from other goods by sweating or otherwise."<sup>2</sup> The sweating of a cargo and the heat generated from the presence of cooperage, apparently sufficiently seasoned when coming from a cold to a warm climate, is a peril of the sea falling within the exception of a bill of lading, unless it appears to have been caused by the negligence of the shipper.<sup>3</sup>

It is not the duty of a common carrier to know the contents of any package offered to him for carriage, when there are no attendant circumstances to awaken his suspicions as to their character, and there can be no presumption of law that he had such knowledge in any particular case of that kind; and he cannot be charged, as a matter of law, with notice of the properties and character of packages thus received. It is only when sufficient grounds exist arising from the appearance of the package, or other circumstances, to excite the carrier's suspicion, that he is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered, as a condition of receiving them for carriage. An express company which received, in the regular course of business, for transportation, a package of nitro-glycerine, ignorant of the material, and transported the same, was not liable for damages resulting from

<sup>1</sup> *The Augusto*, 29 Fed. Rep. 334.

<sup>2</sup> *Paturzo v. Compagnie Francaise*, 31 Fed. Rep. 619.

<sup>3</sup> *The Keystone*, 31 Fed. Rep. 412.

what would have been an improper handling of the same had they known its contents.<sup>1</sup> In *Pierce v. Winsor*, 2 Cliff. 18, a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court held the shipper and not the charterer liable, and observed that "the stowage of the mastic was made in the usual way, and it is not disputed it would have been proper if the article had been what it was supposed to be when it was received and laden on board. Want of great care in that behalf is not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods. In the absence of any showing of negligence, a ship will not be held liable for the loss of chlorides which were shipped in barrels, instead of the usual earboys.<sup>2</sup> The formation of a cement by sweepings of soda and bleaching powder left in a ship from a previous voyage, in combination with molasses leaking from a new cargo, is so remote and indirect a consequence of the failure to clean the ship as not to involve the ship in responsibility for loss of cargo arising from such cement choking the pumps and making it impossible to remove the leaking molasses from sugar upon which it has drained.<sup>3</sup>

Where cold weather would not have caused the loss had not the negligence of the carrier, or the inattention of it co-operated with the cold, it will be held answerable.<sup>4</sup> As between the ship and charterers, the latter are liable for the loss of cargo through bad storage, where the supercargo is their special representative, and the cargo is stored by his orders and under his direction.<sup>5</sup> The master knowing what quality of flour in bags was to be taken on

<sup>1</sup> *Parrot v. Wells*, 82 U. S. 15 Wall. 524, 21 L. ed. 206, affirming same case *sub nom. Parrot v. Barney*, 2 Abb. (U. S.) 197, 1 Sawy. 423, 1 Deady, 405. See *ante*, § 22.

<sup>2</sup> *The Barracouta*, 39 Fed. Rep. 238.

<sup>3</sup> *The Centurion*, 57 Fed. Rep. 412.

<sup>4</sup> *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406.

<sup>5</sup> *The Centurion*, *supra*.

board, and that if there was much heat and storm upon the voyage arising from changing climate, the bags would probably be injured by sweating in the hatch, takes the risk of his servants and other persons providing sufficient room below as the proper place for flour in bags as well as for other provisions.<sup>1</sup> Where goods have been properly packed, a carrier is responsible for injury to them through careless handling.<sup>2</sup> Injury resulting from disregard of instructions assented to by the carrier, respecting the mode of conveyance, will render the latter liable.<sup>3</sup> A carrier receiving fruit for handling is held to the degree of diligence and care required in the transportation of that class of goods.<sup>4</sup> The sealing of a car containing butter when received from a connecting carrier is no excuse for failure to put ice in the car if necessary to protect the butter from the heat.<sup>5</sup>

### § 78. *Jettison.*

If goods are stored in the carrier's vessel properly on deck the carrier will not be answerable if they are necessarily thrown overboard to secure the safety of the vessel and other freight.<sup>6</sup>

It is the duty of the master of a ship to determine the necessity of jettison. His decision as to this necessity, formed with deliberation, skill, courage and honest intention, is conclusive,<sup>7</sup> and his vessel is not liable for a jettison of cargo when aground and in apparent imminent peril, for the purpose of getting afloat.<sup>8</sup> Jettison of heavy goods on deck is always justifiable as a protection

<sup>1</sup> *The Keystone*, 31 Fed. Rep. 412.

<sup>2</sup> *Culbreth v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 392.

<sup>3</sup> *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659.

<sup>4</sup> *Reed v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 176; *Truax v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 233.

<sup>5</sup> *Beard v. Illinois Cent. R. Co.* 7 L. R. A. 280, 79 Iowa. 518.

<sup>6</sup> *Gould v. Oliver*, 4 Bing. N. C. 134; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Smith v. Wright*, 1 Cal. 43, 2 Am. Dec. 162; *Price v. Hurtshorn*, 44 N. Y. 94, 4 Am. Rep. 645; *Hayman v. Molton*, 5 Esp. 65; *New England Ins. Co. v. The Sarah Ann*, 38 U. S. 13 Pet. 387, 10 L. ed. 213; *Post v. Jones*, 60 U. S. 19 How. 150, 15 L. ed. 618; *Fitz v. The Amelie*, 73 U. S. 6 Wall. 18, 18 L. ed. 806.

<sup>7</sup> *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 53.

<sup>8</sup> *The Marlborough*, 47 Fed. Rep. 667.

against further danger, when the ship's safety has been imperilled by such goods.<sup>1</sup> But a propeller which takes on so heavy a deckload of lumber as to be topheavy, and endangers loss of it or puts it in peril in an ordinary wind not exceeding 12 to 15 miles per hour, or anything less than a gale of wind or such a stress of weather as is clearly unusual, must be held liable for the loss of part of the deckload by sliding off while the vessel is rolling heavily,<sup>2</sup> and the fact that nearly one quarter of the lighter's cargo slips off into the sea when the lighter tips a little on encountering a slight puff of wind is of itself, enough to indicate gross negligence on the part of those in charge.<sup>3</sup>

A jettison, the necessity of which is occasioned by peril of the sea, is a loss by peril of the sea and within the exception of a bill of lading; but if it was the unseaworthiness of the vessel which caused or contributed to the necessity of the jettison, the loss is not within the exception of perils of the sea.<sup>4</sup> Or if the goods were wrongfully placed on deck, the carrier will be liable for the loss.<sup>5</sup> If jettison of the cargo is necessary by the negligence or breach of contract of the master or owner, it must be attributed to that fault, not to the sea peril.<sup>6</sup> A carrier is not excused from delivering goods stowed on deck without the consent of the shipper, although they were lost by perils of the sea, unless such manner of stowing the particular goods is sanctioned by commercial usage, or did not in any degree, contribute to the disaster.<sup>7</sup> In the case of jettison of the deckload, the carrier of the ship is not responsible to the owner of the goods where they were on deck with the owner's consent, and there is no general custom to carry them there.<sup>8</sup>

<sup>1</sup> *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58.

<sup>2</sup> *Barker v. The Scallow*, 44 Fed. Rep. 771.

<sup>3</sup> *The City of Alexandria*, 24 Blatchf. 50, 28 Fed. Rep. 202.

<sup>4</sup> *Dupont v. Vance*, 60 U. S. 19 How. 162, 15 L. ed. 584.

<sup>5</sup> *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149.

<sup>6</sup> *Dupont v. Vance*, *supra*; *The Portsmouth v. Onondaga Salt Co.* 76 U. S. 9 Wall. 682, 19 L. ed. 754; *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58.

<sup>7</sup> *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>8</sup> *Lawrence v. Minturn*, *supra*.

## CHAPTER X.

### DEVIATION FROM ROUTE.

- § 79. *What Constitutes a Deviation.*
- § 80. *What not a Deviation from Route.*
- § 81. *Justifiable Deviation from Route.*
- § 82. *Responsibility of Connecting Carrier for Deviation.*

#### § 79. *What Constitutes a Deviation.*

A deviation by the carrier from its voyage will render it responsible even for losses resulting from inevitable casualties.<sup>1</sup> If the carrier has departed from its line of duty, and has violated its contract, and while thus in fault, and in consequence of that fault, goods being carried are injured by the Act of God, which would not otherwise have produced an injury, then the carrier will be liable.<sup>2</sup> And the same rule is applied as to a stipulation to exempt it from negligence where it has violated its contract as to the method of transportation.<sup>3</sup>

A carrier cannot avail itself of any exception in its contract, where it has disobeyed the directions of the shipper as to their carriage in a particular way, or by a particular route.<sup>4</sup> Thus an express exemption, in a bill of lading, of liability for damages to skins from sweating, will not relieve the carrier from liability for

<sup>1</sup> *Davis v. Garrett*, 6 Bing. 716; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Goddard v. Mullory*, 52 Barb. 87; *Lamb v. Camden & A. R. Transp. Co.* 2 Daly, 454; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 574, 6 Am. Rep. 124; *Keeney v. Grand Trunk R. Co.* 59 Barb. 104, 47 N. Y. 525.

<sup>2</sup> *Michaels v. New York Cent. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415.

<sup>3</sup> *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193; *Goodrich v. Thompson*, 44 N. Y. 324; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 255; *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Maghee v. Camden & A. R. Co.* 45 N. Y. 514, 31 Am. Dec. 745; *Hunnell v. Taber*, 2 Sprague, 1; *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525.

<sup>4</sup> *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 31 Am. Dec. 745; *Goodrich v. Thompson*, *Galveston, H. & H. R. Co. v. Allison*, *Robinson v. Merchants Despatch Transp. Co.* and *Graham v. Davis*, *supra*; *Collins v. Bristol & E. R. Co.* 11 Exch. 790.

such damages in case of a deviation from the route prescribed in the bill of lading. A carrier of goods who deviates from the route prescribed by the bill of lading is liable for injuries thereto, which might not have arisen but for such deviation.<sup>1</sup> Such failure to ship over the line of transportation directed, will render the original carrier the insurer for the line he selects.<sup>2</sup>

Any departure from the known rules of navigation will render the carrier liable.<sup>3</sup> A carrier by whose fault in carrying goods by an indirect, instead of a direct, route, the delivery of the goods at their destination is delayed, and by whose fault or negligence they are not delivered, after their arrival, to the consignee on demand and presentation of the bill of lading,—is liable where the goods are afterwards destroyed or injured by the act of God.<sup>4</sup> An express company under a contract of shipment, silent as to the route to be taken, which chooses a long or inexpeditious railroad route when there is a direct and speedy line which it may use, is liable for any damage resulting from the additional time consumed in the journey.<sup>5</sup> Where the first carrier delivers the goods to a railroad other than that named in the agreement, and they are burned while in possession of such second carrier, the first carrier is liable for the loss.<sup>6</sup>

Where a shipper of freight gives directions to the freight agent of the initial carrier at the point of shipment as to the particular route by which the freight shall be shipped to destination, it is the duty of the freight agent to make such notations on the way-bill as will reasonably and properly carry the freight by such particular route to destination. A shipper at Troupe, Texas, directs the freight agent of a carrier to bill his freight from that point to Fort Lawn, South Carolina, *via* Vicksburg, Jackson, Meridian, Birmingham, Atlanta, Augusta and Columbia. The freight agent

<sup>1</sup> *Robertson v. National Steamship Co.* 14 N. Y. Supp. 313.

<sup>2</sup> *Isaacson v. New York Cent. & H. R. R. Co.* 94 N. Y. 278, 46 Am. Rep. 142.

<sup>3</sup> *Atwood v. Reliance Transp. Co.* 9 Watts, 87, 34 Am. Dec. 503.

<sup>4</sup> *Richmond & D. R. Co. v. Benson*, 86 Ga. 203.

<sup>5</sup> *Wells, Fargo & Co. v. Fuller*, 4 Tex. Civ. App. 213.

<sup>6</sup> *Independent Mills Co. v. Burlington C. R. & N. R. Co.* 72 Iowa, 535. See also *Palmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137; *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

simply inserts in the waybill that the destination of the freight is Fort Lawn, South Carolina, "*via* Vicksburg," in consequence of which the freight at Vicksburg is billed to Atlanta and consigned to the Richmond & Danville Railroad Company, by which it is carried to Fort Lawn without being carried by way of Augusta and Columbia, and as a result of this the shipper is compelled to pay eighty-six cents more for the carriage than if it had been billed *via* Augusta, as directed by the shipper, the rates by all-rail lines from Vicksburg to Augusta being the same, and not the same from Vicksburg to Fort Lawn *via* Atlanta. Evidently in this the freight agent failed to do his duty; he should have made a notation on the waybill *via* Vicksburg and Augusta; and upon request the initial carrier should refund to the shipper the amount of this overcharge occasioned by the oversight of its freight agent. If, on the other hand, the shipper at Troupe, Texas, had given the freight agent no directions whatever as to the particular route by which the freight was to be sent forward to its destination at Fort Lawn, South Carolina, but had simply left it to the freight agent to select the route for him, as is frequently done by shippers in such cases, then, in that event, in selecting such route for the shipper, it would have been the duty of the freight agent to have forwarded the freight by the best and cheapest route for the shipper, so far as the freight agent knew, or was informed, and to have made such notations on the waybill as would reasonably have carried it by that route, for in doing that service he would have been acting as the agent of the shipper as well as of the company.<sup>1</sup> A carrier who forwards, partly by vessel and partly by rail, goods which he has contracted to carry directly by a specified steamer over another route, becomes an insurer, and cannot invoke the benefit of any exception in the contract.<sup>2</sup>

If the goods are sent by a different conveyance or in a different manner from that implied by the undertaking, and they are lost, the carrier will be liable.<sup>3</sup> A provision in a bill of lading of

<sup>1</sup> *Sankey v. Richmond & D. R. Co.* 3 Inters. Com. Rep. 33.

<sup>2</sup> *Robertson v. National SS. Co.* 42 N. Y. S. R. 694.

<sup>3</sup> *Sleat v. Fugg*, 5 Barn. & Ald. 342; *Nicholson v. Willan*, 5 East, 507; *Duff v. Budd*, 3 Brod. & B. 177; *Garnett v. Willan*, 5 Barn. & Ald. 53; *Barnwell v. Hussy*, 1 Mill. Const. 114.



oranges, that the ship "now lying in the port of Malaga, bound for Liverpool," shall have liberty "to proceed to and stay at any port or ports in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland," for any purpose,—does not authorize a deviation to a port not in the direction of Liverpool. A printed provision of the charter-party of a steamship stated to be lying in Malaga and bound for Liverpool, that she shall have liberty to proceed to and stay in any port or ports in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain, and Ireland, for any purpose, will not be construed to defeat the main object and intent of the contract,—the carriage of oranges from Malaga to Liverpool,—and such liberty must be restricted to ports in the course of the voyage.<sup>1</sup>

If goods are shipped "through without change of cars," storage on the route where they are burned will render the carrier liable.<sup>2</sup> So if the shipment is to be by a vessel named, the carrier deviating without just cause, of which the court must, as a matter of law, judge, will be liable.<sup>3</sup> Having named the vessel, the carrier departs from the direction of the shipper at his peril.<sup>4</sup> A carrier receiving a package at Akron, Pa., for St. Augustine, Florida, marked "*via* Philadelphia care Atlantic Coast Line, fast freight," and who forwarded the goods from Philadelphia by steamer is liable for a loss by fire on the steamer.<sup>5</sup>

### § 80. *What not a Deviation from Route.*

Where, in the bill of lading, the railroads are specified over

<sup>1</sup> *Margetson v. Glynn* [1892] 1 Q. B. 337 [1893] App. Cas. 351.

<sup>2</sup> *Stewart v. Merchants Despatch Transp. Co.* 47 Iowa, 229, 29 Am. Rep. 476.

<sup>3</sup> *Read v. Spaulding*, 5 Bosw. 395, 30 N. Y. 630, 86 Am. Dec. 426.

<sup>4</sup> *Dunseth v. Wade*, 3 Ill. 285; *Merchants Despatch Transp. Co. v. Kahn*, 76 Ill. 520; *Marckwald v. Oceanic Steam Nav. Co.* 11 Hun, 462.

<sup>5</sup> *Phila. & R. R. Co. v. Beck*, 125 Pa. 620; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193; *Magnin v. Dinsmore*, 70 N. Y. 410, 26 Am. Rep. 608; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Collins v. Bristol & E. R. Co.* 11 Exch. 790; *Hunnewell v. Tiber*, 25 Payne, 1; *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525; *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 19 L. ed. 457; *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440.

which the goods are to be shipped to a point named, and "there delivered to the agent of the next connecting steamboat, railroad company or forwarding line," etc., the bill of lading was conclusive evidence of the contract under which the goods were accepted, and the carrier was not bound to carry entirely by railroad.<sup>1</sup>

Where there is nothing in the bill of lading restricting the carrier as to the particular route over which goods are to be forwarded, oral testimony cannot be introduced that the carrier, at the time the bill of lading was received by the shipper, guaranteed to forward by a particular route.<sup>2</sup> Where goods marked to a consignee at a point beyond the terminus of the receiving railroad, the usual route to which was by water from such terminus, were delivered by the shippers to the company, accompanied by "a trade ticket" providing that the goods should be forwarded "subject to the company's regular bill of lading" which gave the company the option of choosing the route from its terminus if the company delivered the goods at its terminus to a steamer for the designated destination, its liability ended.<sup>3</sup> Where a charter party to ship fruit from Sicily to Boston, provides that the vessel shall take the "nearest passage," the ship is bound to keep the coolest passage those in the trade are accustomed to keep, in the absence of any known passage as to which a discretion had been given.<sup>4</sup>

A deviation by a carrier from the route and manner of transportation stipulated for in a bill of lading, in accordance with a uniform and notorious usage with reference to which the contract was made, does not render the carrier liable as an insurer against unavoidable casualty.<sup>5</sup>

<sup>1</sup> *Bostwick v. Baltimore & O. R. Co.* 55 Barb. 137.

<sup>2</sup> *White v. Ashton*, 51 N. Y. 284; *Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 519; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 423; *Hinckley v. New York Cent. & H. R. Co.* 56 N. Y. 433. See *Camden & A. R. Co. v. Forsyth*, 61 Pa. 81; *Simkins v. Norwich & N. L. S. B. Co.* 11 Cush. 102; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276, 288, 19 L. ed. 347, 353.

<sup>3</sup> *Hosletter v. Baltimore & O. R. Co.* (Pa.) 10 Cent. Rep. 352.

<sup>4</sup> *The John H. Pearson*, 33 Fed. Rep. 845.

<sup>5</sup> *Robertson v. National S.S. Co.* 139 N. Y. 416.

### § 81. *Justifiable Deviation from Route.*

There is a class of cases in which an agent is justified, by an unexpected emergency, in deviating from his instructions where the safety of the property requires it. But, where the circumstances prevent the compliance with the directions of the shipper, the carrier will not be justified in adopting some other method of transportation or some other route, where the only damage that would result to the shipper would be the delay in communicating with him and awaiting his instructions, while the goods were properly stored.<sup>1</sup> If the ship designated in the bill of lading does not sail, the carrier must notify the shipper and usually delay shipments.<sup>2</sup> But while a deviation cannot be made for the mere convenience of the carrier, without rendering it liable for the injury which may result; yet, such a deviation from the instructions of the shipper may be made in the case of an unforeseen necessity<sup>3</sup> and a necessary change of route or means of transportation is justifiable,<sup>4</sup> as forwarding perishable freight by rail, where a storm prevents a boat from proceeding on its voyage.<sup>5</sup>

In case of an interruption on the stipulated line of transportation, a carrier is bound to use all reasonable means such as a prudent owner, being present, would take to protect the property from unnecessary loss or damage,<sup>6</sup> and the necessity arising for deviation from the route prescribed, the carrier must use due caution in the new route selected, thus, where a carrier was stalled in a ford, the bridge being impassable, he was held liable. McCulloch, J., stating that he ought to have ascertained the state of the ford before he entered.<sup>7</sup> While the carrier should notify the consignee with reasonable dispatch of the necessity for the deviation, and the new route adopted, yet neglect to notify the con-

<sup>1</sup> *Alabama & G. S. R. Co. v. Thomas*, 89 Ala. 294; *Phillips v. Bingham*, 26 Ga. 617.

<sup>2</sup> *Goodrich v. Thompson*, 44 N. Y. 324.

<sup>3</sup> *Johnson v. New York Cent. R. Co.* 33 N. Y. 610, 88 Am. Dec. 416.

<sup>4</sup> *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745.

<sup>5</sup> *Regan v. Grand Trunk R. Co.* 61 N. H. 579; *Johnson v. New York Cent. R. Co.* 31 Barb. 196. But see *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54.

<sup>6</sup> *Regan v. Grand Trunk R. Co.* *supra*.

<sup>7</sup> *Campbell v. Morse*, 1 Harp. L. 468.

signee of a change of route does not render the carrier liable for loss or damage happening from delay in the delivery of the goods, which such notice would not have affected.<sup>1</sup>

### § 82. *Responsibility of Connecting Carrier for Deviation.*

It has been held that a carrier receiving goods to be transported beyond its line, in delivering them to a subsequent carrier, acted as a special agent of the consignor with limited powers, and that if it disregarded its instructions and exceeded its authority, the subsequent carrier could not maintain a lien upon the goods for its transportation charges.<sup>2</sup> Indeed, in an action against railroad companies for the value of wheat carried by them and destroyed by fire after reaching its destination, where the averment is that the first carrier delivered the wheat to a railroad, other than that named in the agreement, and that it was burned while in the possession of such second carrier, this averment was held sufficient to support a recovery against both railroads.<sup>3</sup>

In later decisions in other states the doctrine of the Michigan court, however, has not been followed, the courts now generally holding that a carrier, receiving goods to be transported over its own line to a point beyond, has the apparent authority to select any of the ordinary routes leading thereto; that a common carrier not being bound at common law to carry except on its own line, if it contracts to go beyond, it may confine itself in carrying to a particular route it chooses to use and may select its own agencies.<sup>4</sup> And that the second carrier, receiving the goods in good faith in the ordinary and usual course of business between connecting lines, without notice of any special directions on the part of the consignor, will have a lien for his reasonable charges for transporting such goods over its own line, and also for such reasonable charges as it may have advanced to the first carrier.<sup>5</sup>

<sup>1</sup> *Regan v. Grand Trunk R. Co.* 61 N. H. 579.

<sup>2</sup> *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33.

<sup>3</sup> *Independent Mills Co. v. Burlington, C. R. & N. R. Co.* 72 Iowa, 535.

<sup>4</sup> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291.

<sup>5</sup> *Price v. Denver & R. G. R. Co.* 12 Colo. 402.

An examination of the opinion of Commissioner Stallcup in the case just cited will show that while the right of the consignors to select the routes over which the goods should be transported is fully recognized, it is held that in case his instructions in reference thereto are not obeyed by the first carrier, the owner's action was not against the innocent second carrier, but against his own wrongdoing agent.<sup>1</sup> In the first two cases cited the ignorance of the second carrier of the terms of the contract is made an express condition of its exemption from liability in case of loss to the owner. And a reading of the opinion in the case of *Briggs v. Boston & L. R. Co. supra*, will also show that in that case no wrong or negligence was attributable to the defendant company. The rights of a connecting carrier receiving goods from another carrier cannot be affected by any limitations put upon the latter's authority by the shipper, of which the connecting carrier has no notice.<sup>2</sup> The fact that goods as delivered by the first carrier to the second are loaded in a car belonging to a certain road which runs to the place of destination other than the road of the second carrier, does not imply a notice to such second carrier that the goods are to be shipped over the road of the carrier on which they were loaded.<sup>3</sup>

But where the possession of the property is not obtained in good faith by the defendant in the ordinary or usual course of business between connecting carriers, but such possession is wrongful and illegal, the defendant is consequently not entitled to a carrier's lien upon the same either for its own charges or those advanced to the former carrier.<sup>4</sup>

<sup>1</sup> In support of this position, the following cases were relied upon: *Patten v. Union Pac. R. Co.* 27 Fed. Rep. 590; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56; *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626.

<sup>2</sup> *Price v. Denver & R. G. R. Co.* 12 Colo. 402.

<sup>3</sup> *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

<sup>4</sup> *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Andrews v. Dieterich*, 14 Wend. 31; *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626; *Hill v. Denver & R. G. R. Co.* 4 L. R. A. 376, 13 Colo. 35.

## CHAPTER XI.

### DELAY IN TRANSPORTATION OF GOODS.

- § 83. *What will be Considered Delay.*
- § 84. *Insufficient Means of Transportation.* See ante, § 5.
- § 85. *Delay from Storm or Collision.*
- § 86. *Delay in Delivering to Connecting Carrier.*
- § 87. *Duty to Forward Goods in Case of Wreck or Delay.*
- § 88. *Care of Goods During Delay.*
- § 89. *Contract to Deliver at Specified Date.*
- § 90. *Consequences of Delay.*
  - a. *When Caused by Strikers, etc.*

#### § 83. *What will be Considered Delay.*

What will be considered delay in the carriage of goods must, of course, depend upon the method of transportation and the effect of weather upon this method. So of the pressure of business, or of any other circumstance that may reasonably be held to excuse the carrier for not having delivered the goods within a reasonable time.<sup>1</sup> A common carrier who receives goods for

<sup>1</sup> *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 278; *Cincinnati, I. St. L. & C. R. Co. v. Case*, 122 Ind. 310; *McGraw v. Baltimore & O. R. Co.* 18 W. Va. 361, 41 Am. Rep. 696; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Hewitt v. Chicago, B. & Q. R. Co.* 63 Iowa, 611; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Taylor v. Great Northern R. Co.* L. R. 1 C. P. 385; *Ballentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315; *Hadley v. Clarke*, 8 T. R. 259; *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178; *Wibert v. New York & E. R. Co.* 12 N. Y. 245; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Gerhard v. Neese*, 36 Tex. 635; *Pulmer v. Lorrillard*, 16 Johns. 348; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562; *Bennett v. Bryam*, 38 Miss. 17, 75 Am. Dec. 90; *Boner v. Merchants SS. Co.* 1 Jones L. 211; *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272; *Raphael v. Pickford*, 5 Mann. & G. 551; *Hughes v. Great Western R. Co.* 14 C. B. 637; *Livingston v. New York Cent. & H. R. R. Co.* 5 Hun, 562; *Silver v. Hale*, 2 Mo. App. 557; *Briddon v. Great Northern R. Co.* 28 L. J. Exch. 51; *Broadwell v. Butler*, 6 McLean, 296.

transportation is bound to use only ordinary and reasonable diligence in regard to the time of transportation.<sup>1</sup>

In respect to the time of delivery, the carrier is responsible only for the exertion of due diligence and the exercise of at least ordinary forecast in anticipating obstructions, and exerting the proper means of overcoming them; and to use due diligence in accomplishing the transportation as soon as the obstruction is removed, in the meantime being responsible for the safe-keeping of the articles detained.<sup>2</sup> What will be due diligence, will depend much on the character of the goods; the question whether want of expedition will peril their preservation and their liability, from exposure during delay, to be injuriously affected by the elements. In this respect, common carriers stand upon the same ground with other bailees. They may excuse delay in the delivery of goods by accident or misfortune which was inevitable or produced by the Act of God. It is sufficient if they exert due care and diligence to guard against delay if the goods are finally delivered in safety. Indeed, the carrier may excuse delay in delivering the goods by proof of misfortune or accident, though not inevitable or produced by the act of God.<sup>3</sup>

The principle upon which the extraordinary responsibility of common carriers is founded, does not require that the responsibility should be extended to the time occupied in the transportation; the danger of robbery or embezzlement by collusion or fraud, on the part of the carrier, has no application to the question of delay.<sup>4</sup> If a shipper promises the carrier to do something which will enable the latter to make the time of transportation

<sup>1</sup> *Johnson v. East Tennessee, V. & G. R. Co.* 90 Ga. 810.

<sup>2</sup> *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562.

<sup>3</sup> *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 665.

<sup>4</sup> *Parsons v. Hardy*, *Wibert v. New York & E. R. Co.*, *McGraw v. Baltimore & O. R. Co.*, *East Tennessee & G. R. Co. v. Nelson*, *Bennett v. Bryam*, *Vicksburg & M. R. Co. v. Ragsdale*, *Boner v. Merchants SS. Co.*, *Gerhard v. Neese*, and *Philadelphia, W. & B. R. Co. v. Lehman*, *supra*; *Nudd v. Wells*, 11 Wis. 408; *Michigan S. & N. I. R. Co. v. Day*, *Taylor v. Great Northern R. Co.*, *Bridgdon v. Great Northern R. Co.* and *Hughes v. Great Western R. Co.* *supra*; *Hales v. London & N. W. R. Co.* 4 Best & S. 66, 32 L. J. Q. B. 292; *Raphael v. Pickford*, 5 Mann. & G. 551; *Geismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 55 Am. Rep. 837, 26 Am. & Eng. R. Cas. 287; *Wren v. Eastern Counties R. Co.* 1 L. T. N. S. 5.

shorter than it otherwise would be and fails to perform, such fact may be shown in excuse for the delay without changing the contract of affreightment.<sup>1</sup> The principle imposing the liability of an insurer on the carrier does not extend beyond the delivery of the goods. It does not reach the condition in which they are delivered. The freezing of canals excuses delay; but during the delay, the carrier must not be guilty of negligence in taking care of the articles detained.<sup>2</sup> Accident or misfortune will excuse the carrier, unless he has expressly contracted to deliver the goods within a limited time.<sup>3</sup>

In some courts, an attempt has been made to include delay within the terms of the imposed duty, but to relax the strictness of the rule in determining what, in any special case, will constitute delay. Thus it is said that nothing will relieve the carrier from its obligation to deliver goods at their destination within a reasonable time, but the act of God, the public enemy, the act or conduct of the owner, or a special contract; but what will constitute a reasonable time, must be determined by the circumstances surrounding each case, and an extraordinary press of business—where the carrier has provided for all ordinary business—will be a sufficient excuse to extend ordinary time.<sup>4</sup>

The result, under either rule, relieves the carrier from the common law liability as an insurer. To show when they ought to have arrived, the contract being silent, it should appear what length of time was usually required or was reasonably necessary to effect the transit.<sup>5</sup> An action for delay in transporting freight is not maintainable where the goods reached their destination in the time usually occupied in the journey, and there was no special undertaking for delivery in a fixed time.<sup>6</sup> A shipper of a lot of

<sup>1</sup> *Illinois Cent. R. Co. v. Miller*, 32 Ill. App. 259.

<sup>2</sup> *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562; *Wibert v. New York & E. R. Co.* 12 N. Y. 245.

<sup>3</sup> *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Wibert v. New York & E. R. Co.* *supra*; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Bowman v. Teall*, *supra*; *Forward v. Pitard*, 1 T. R. 27; *McHenry v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 448.

<sup>4</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

<sup>5</sup> *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 602.

<sup>6</sup> *Lowe v. East Tennessee, V. & G. R. Co.* 90 Ga. 85.



venison by express, who was induced to deliver it to the company for shipment by the promise of its agent that he would forward it on the same night, may recover for its loss by failure to ship it until the next day.<sup>1</sup> Where the usual time within which produce was transported from one point to another was two and one half to three days, and a part of the shipment did not reach its destination until 11 days, and the remainder some 45 days after it was shipped, it was held to be such a delay as would render the company liable for the resulting damages.<sup>2</sup> While unusual and unexplained delay is prima facie evidence of want of ordinary care, yet for slight delay, the burden is upon the plaintiff to show negligence.<sup>3</sup> And direct evidence is not necessary; but the duty to forward goods forthwith may be inferred from an established course of dealing between the owner and the carrier.<sup>4</sup> A delay of a carrier in transporting perishable goods is not excused by a failure of the consignee to unload the goods on Sunday, by which means they might have been saved.<sup>5</sup>

A delivery to the carrier, with the name and address of the consignee marked upon the goods, is, in the absence of some direction or agreement otherwise, equivalent to an express direction to transport them to such consignee at once.<sup>6</sup> It is within the authority of a railroad company's freight agent to assure a shipper that there will be no delay in unloading his consignment, thereby inducing him to make a shipment at a certain time.<sup>7</sup> Knowledge on the part of the carrier that there is a snow blockade on the road, will not excuse delay in shipment, unless it advises the shipper of such fact on receiving the goods.<sup>8</sup> Failure to insert in a bill of lading stipulating for conveyance by steamer, the name of the particular steamer by which the shipment is to be made, will not

<sup>1</sup> *Cantwell v. Pacific Exp. Co.* 58 Ark. 487.

<sup>2</sup> *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83.

<sup>3</sup> *Mann v. Birchard*, 40 Vt. 326.

<sup>4</sup> *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222.

<sup>5</sup> *St. Clair v. Chicago, B. & Q. R. Co.* 80 Iowa, 304, 42 Am. & Eng. R. Cas. 414.

<sup>6</sup> *Gregory v. Wabash R. Co.* 46 Mo. App. 574.

<sup>7</sup> *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

<sup>8</sup> *Great Western R. Co. v. Burns*, 60 Ill. 284.

prevent recovery from a steamer forming part of an association of several vessels under an understanding that the first boat passing the place of shipment shall take the cargo, and which was the first boat to pass,—especially where it is customary to leave the name blank, or, if inserted, for the master of the steamer to change it.<sup>1</sup>

An exception from the lay days in a charter party, of delay caused by restraints of princes and rulers, political disturbances or impediments, includes delay at the port of loading by reason of the existence of a state of war in the town rendering it impossible to load therefrom; delay after it becomes possible to load from such port by reason of the railway from the mines to the port, over which the cargo is to be transported in the ordinary custom of loading, being in the hands of the troops; and delay while detained at another port into which the vessel puts for coal, because of a demand by a rival government for export duties already paid to the government in charge at the port of loading.<sup>2</sup> A railway may be excused for a delay in transportation where, in time of war, it is under military control occasioning the delay.<sup>3</sup> A state statute compelling the shipment of freight within a certain time after receiving it, under a penalty for default, is not an unconstitutional regulation of interstate commerce as to freight for shipment out of the state, as it tends not to trammel or obstruct, but to expedite such commerce.<sup>4</sup>

§ 84. *Insufficient Means of Transportation.* See ante, § 5.

Delay in carriage may sometimes be excused by the fact, that the carrier's means of transportation—without his own fault—have proved insufficient to forward all the goods in good faith received, and under such circumstances, it is his duty, if there be

<sup>1</sup> *The Guiding Star*, 53 Fed. Rep. 936.

<sup>2</sup> *Smith v. Rosario Nitrate Co.* [1893] 2 Q. B. 323.

<sup>3</sup> *Illinois Cent. R. Co. v. Ashmead*, 58 Ill. 487.

<sup>4</sup> *Bagg v. Wilmington, C. & A. R. Co.* 3 Inters. Com. Rep. 803, 14 L. R. A. 596.

among the goods perishable articles, demanding for their preservation immediate transportation, to give such goods the preference; and he will be excused for the necessary delay which other unperishable goods may sustain.<sup>1</sup>

Where the railroad which acts as carrier, is in good order and well equipped, and as many trains are run upon it as can be done with safety, a delay caused by an extraordinary pressure of freight being thrown upon it, which is forwarded without preference in the order of its receipt, will be excused.<sup>2</sup> An unusual quantity of freight being delivered to a road properly equipped, will excuse resulting delay in transportation, if there be no special contract between the carrier and shipper.<sup>3</sup> A carrier is not liable for a delay of thirty-six hours in delivering a carload of meat, whereby a loss occurred owing to a fall in the price, where such delay could not have been prevented, being due to the crowded condition of the yard, and it was delivered with as much despatch as possible under the circumstances.<sup>4</sup>

While the carrier may decline to accept freight on account of unusual press of business or inadequacy of rolling stock,—yet, if it receives the freight, knowing that it will be delayed, the carrier will not be excused for not delivering promptly.<sup>5</sup> But it has been held, that where the jury were informed that “press of freight will not excuse failure to carry goods in ordinary time, where such press had existed for a long time, and was known to the company when they received the goods, unless they notify the shipper,” this was not a fair statement of the law; that there is no rule not subject to exceptions, which requires freight to be carried in the order in which it is received, without regard to its

<sup>1</sup> *Tierney v. New York Cent. & H. R. R. Co.* 76 N. Y. 305, 10 Hun, 569; *Peet v. Chicago & N. W. R. Co.* 20 Wis. 594, 91 Am. Dec. 446; *McAndrews v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657; *Great Western R. Co. v. Burns*, 60 Ill. 284; *Michigan Cent. R. Co. v. Burroes*, 33 Mich. 6.

<sup>2</sup> *Wibert v. New York & E. R. Co. and Michigan Cent. R. Co. v. Burroes*, *supra*; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426.

<sup>3</sup> *Wibert v. New York & E. R. Co.* 12 N. Y. 245, 19 Barb. 36; *Jones v. New York & E. R. Co.* 29 Barb. 633, disapproving *Kent v. Hudson River R. Co.* 22 Barb. 278; *Pittsburg, C. C. & St. L. R. Co. v. Morton*, 61 Ind. 539, *ante*, § 5.

<sup>4</sup> *Smith v. Cleveland, C. C. & St. L. R. Co.* (Ga.) July 24, 1893.

<sup>5</sup> *Faulkner v. Southern Pac. R. Co.* 51 Mo. 311.

character, condition, or its liability to perish.<sup>1</sup> Where a railroad company is properly equipped, it cannot be held liable for loss of anticipated profits where, without special contract as to time of transportation, a delay occurs caused by an extraordinary press of business,—if the goods are forwarded with such expedition as is practicable. It may be liable, however, for injury to the goods during the delay.<sup>2</sup> A vessel is not liable for breach of a charter or contract to carry freight, made by one who, having a contract for her purchase, obtained possession of her without the consent or authority of the owner, and made in his own name the contract sought to be enforced.<sup>3</sup>

### § 85. *Delay from Storm or Collision.*

The carrier is not responsible for delay on the voyage on account of boisterous weather or adverse winds, low tides, or the like, over which it has no control.<sup>4</sup> Delay in the shipment will be excused, where a freshet destroyed a railroad bridge, though the carrier will be liable for injury caused by bad handling.<sup>5</sup> Delay will be excused resulting from a collision, either of railroad trains or steamers, but the collision—either on land or water—must not be due to the carrier's own negligence.<sup>6</sup>

A carrier which has provided a place of storage for goods safe against all but extraordinary events, is not liable for damage caused by a flood such as occurs but twice in a generation, and the fact that a similar flood, otherwise unprecedented, had occurred once in each of the two preceding years, is not enough to make a carrier liable for damages to freight on account of a flood.<sup>7</sup> A freshet, or a snowstorm or fog, or the destruction of a bridge, or the low state of water, or the obstruction of a con-

<sup>1</sup> *Peet v. Chicago & N. W. R. Co.* 20 Wis. 594, 91 Am. Dec. 446.

<sup>2</sup> *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 272.

<sup>3</sup> *The C. E. Conrad*, 57 Fed. Rep. 256.

<sup>4</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985.

<sup>5</sup> *Lipford v. Charlotte & S. C. R. Co.* 7 Rich. L. 409.

<sup>6</sup> *Conger v. Hudson River R. Co.* 6 Duer, 375.

<sup>7</sup> *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182.

necting road, will excuse delay caused thereby.<sup>1</sup> The master of a waterlogged vessel at port cannot contract for towage to the point of destination, where the price is exorbitant, and the owner is within easy reach of a telegram.<sup>2</sup>

Among the recent cases of particular importance in respect to the liability of railroad companies is a Pennsylvania decision holding that the grossly criminal act of a stranger in letting off the brakes on loaded cars standing on an open switch and then closing the switch so that the cars ran out on the main track, causing a collision with another train, will not render the company liable in the absence of negligence in failing to discover the mischief or preventing its effect.<sup>3</sup> It appeared that throw-off switches to prevent such casualties had been constructed, but one of them was not opened, and the other, though open, was unlocked; but it was left to the jury to say whether or not the company had exercised sufficient prudence when it left the cars with the brakes on and the switch open so as to disrail the cars if they got loose, and the jury found the care sufficient.

A somewhat similar case from Georgia,<sup>4</sup> held that the mere fact that a railroad company fails to recover from a discharged employe a key to a switch is not sufficient to make the company liable for his criminal act in maliciously misplacing the switch and wrecking the train. It is said that the company is not bound to anticipate that so heinous a crime would be com-

<sup>1</sup> *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106; *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Peck v. Weeks*, 34 Conn. 145; *Bullentine v. North Missouri R. Co.* 40 Mo. 491, 93 Am. Dec. 315; *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182; *Livingston v. New York Cent. & H. R. R. Co.* 5 Hun, 562; *Beckwith v. Frisbie*, 32 Vt. 559; *Silver v. Hule*, 2 Mo. App. 557; *Kinnick v. Chicago, R. I. & P. R. Co.* 69 Iowa, 665, 27 Am. & Eng. R. Cas. 55; *Briddon v. Great Northern R. Co.* 32 L. T. 94; *Bowman v. Trall*, 23 Wend. 306, 35 Am. Dec. 562; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Sweetland v. Boston & A. R. Co.* 102 Mass. 276; *Curtis v. Chicago & N. W. R. Co.* 18 Wis. 312; *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Wallace v. Clayton*, 42 Ga. 443.

<sup>2</sup> *Botsford v. Plummer*, 67 Mich. 264.

<sup>3</sup> This is the case of *Fredericks v. Northern Cent. R. Co.* 22 L. R. A. 306, 157 Pa. 103.

<sup>4</sup> *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 22 L. R. A. 315.

mitted in revenge for the discharge of the employe. These cases touch on a question of very great importance which has not been largely developed up to the present time, but which is considered in a note to the former case, in 22 L. R. A. 306. The obligation of the carrier of goods, while demanding reasonable expedition, does not require it to use extraordinary exertions or expenses to surmount obstacles occasioned by the weather.<sup>1</sup> But a clause of a charter giving liberty to tow and assist vessels in all situations does not justify delay incident to a steamship service in towing a disabled vessel, where the master knows that the cargo must necessarily suffer certain decay or deterioration from the delay caused by the salvage operations, but the vessel must make compensation for the loss occasioned the cargo by such delay. The liability of a cargo of chilled beef to deterioration by remaining at sea more than nineteen days is not a matter of common knowledge with notice of which the master of a steamship is chargeable, but is a matter of expert knowledge which must be proved to render the vessel liable for injuries caused by delay beyond such time in rendering a salvage service, where the charter provides that the vessel may render towage services.<sup>2</sup>

Where the court on the trial excluded evidence that the delay was occasioned by the carrier's boat having been run against and injured by a scow, which rendered it necessary for it to stop and repair the injury, the appellate court reversed the ruling; and recognized that the freezing of the canal immediately afterwards, which was an "act of God," excused a continued delay in that case. The shipper in that case, having accepted the goods at the place of collision, was held to have released the carrier from all further responsibility, and incurred the liability to pay him *pro rata* compensation for their transportation to that point.<sup>3</sup>

### § 86. *Delay in Delivering to Connecting Carriers.*

A common carrier of perishable goods must use reasonable diligence to deliver the property to the connecting carrier for

<sup>1</sup> *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 173.

<sup>2</sup> *The Wells City*, 57 Fed. Rep. 317.

<sup>3</sup> *Parsons v. Hardy*, 14 Wend. 216, 28 Am. Dec. 521.

transportation to the place of consignment.<sup>1</sup> A carrier is liable for detention of goods, addressed to a specified place "*via*" another, at the latter, without using reasonably available means to forward them to their destination or notifying the consignee, notwithstanding any custom of its own not communicated to the shipper or consignee.<sup>2</sup> Where goods marked beyond its own line are accepted by the carrier, it will be answerable for any negligence or delay which prevents the arrival of the goods at their destination in a reasonable time, just as though such delay had occurred on its own line of road.<sup>3</sup>

Where the carrier declined to permit the owner of cotton, which was in its depot for transportation, to deliver it to another carrier, or to make such delivery itself, but undertook to transport it in three days, it was guilty of gross negligence in permitting the cotton to remain exposed until it became greatly deteriorated in value, during several succeeding months.<sup>4</sup> Where the agent of a railroad, duly authorized, agrees to forward freight by another line, the railroad will be liable for a failure.<sup>5</sup> A delay on the carrier's own route will not be excused, because it knows that there is a block on the connecting line over which the goods must be transported.<sup>6</sup>

### § 87. *Duty to Forward Goods in Case of Wreck or Delay.*

As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by some cause arising from irresistible force, over which he has no control and which cannot be guarded against by the watchful exertion of human skill and prudence.<sup>7</sup> It is the duty of common carriers to provide sufficient and suit-

<sup>1</sup> *McKay v. New York Cent. & H. R. R. Co.* 50 Hun, 563.

<sup>2</sup> *Denver & R. G. R. Co. v. De Witt*, 1 Colo. App. 419.

<sup>3</sup> *Sisson v. Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

<sup>4</sup> *Glenn v. Charlotte & S. C. R. Co.* 63 N. C. 510.

<sup>5</sup> *Michigan S. & N. I. R. Co. v. Day*, 20 Ill. 375, 71 Am. Dec. 273.

<sup>6</sup> *McLaren v. Detroit & M. R. Co.* 23 Wis. 133.

<sup>7</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

able means for the carriage of the goods they receive, and to make delivery of them with all convenient dispatch; and, while accidents and obstructions will excuse delay, they do not put an end to the contract, which must be completed as soon as the impediment to the transportation of the property is removed or can reasonably be overcome. A carrier is not relieved from liability for failure to deliver goods by the impassibility of a tunnel on its road, where it has other means of making delivery or has repaired the tunnel.<sup>1</sup>

When a vessel contracts to carry a cargo, and actually receives it, and meets with an excepted accident in the inception of or during her voyage, no time being limited, she must repair and continue and complete the voyage, if the repairs can be made within a reasonable time.<sup>2</sup> It is the duty of the master of a wrecked vessel, whether insured or not, to use reasonable diligence to save and if he cannot repair in time, to reship the cargo; and where it appears that a part of the cargo was so stored that it might have easily been saved, and that several opportunities to reship what was saved were neglected, the carrier is responsible to the shipper for his loss, although the shipment was at the owner's risk, and "dangers of the river" were excepted.<sup>3</sup> When the vessel is wrecked or otherwise disabled in the course of the voyage and cannot be repaired without too great delay and expense, the master is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a continuous port, or at one within a reasonable distance, it becomes his duty, under such circumstances, to procure it and transport the goods to their place of destination; and in that event, he is entitled to charge the goods with the increased freight arising from the hire for the vessel so procured.<sup>4</sup>

Upon bills of lading wherein transshipment is provided for, or the vessel is under the necessity of transshipping the goods at an

<sup>1</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489.

<sup>2</sup> *Card v. Hine*, 39 Fed. Rep. 818.

<sup>3</sup> *Bixby v. Deemar*, 54 Fed. Rep. 718.

<sup>4</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.



intermediate port through disasters at sea, the owner of the cargo is liable for any increase of freight arising from the hire of another vessel.<sup>1</sup> But, while the carrier cannot excuse delay because of some unexpected, but not disproportionate expense arising in transportation,<sup>2</sup> he has been permitted to excuse delay where the condition of the elements required an extra expense to avoid its effects.<sup>3</sup> Nor must the carrier, in order to expedite the delivery, imperil the safety of the goods.<sup>4</sup> And where the route of a carrier is to a point by rail and thence by water, it has been ruled that it is not bound to send the goods through by rail, where the water navigation is obstructed.<sup>5</sup> Where goods are to be transported, by canal, for instance, and the goods are detained by the weather, by the locks breaking or the like, unless there has been a want of due diligence on the part of the carrier, he will not be liable to damages on account of the delay, nor can he be compelled to forward the goods by land to the place of destination at his own expense and if the goods finally arrive in safety he is not answerable in damages.<sup>6</sup>

While the carrier may be excused for delay caused by interruption of travel, embargo, or other causes beyond his control, yet, when the obstacle is removed, it is his duty at once to proceed, with all reasonable diligence, to complete the carriage.<sup>7</sup> Where goods are perishable and the carriage is interrupted, if unable to communicate with the shipper, without imperiling the goods by the delay, it is the duty of the carrier to use prompt measures to forward the goods, and reasonable expenditures incurred in accomplishing this will be allowed him. That rule, however, is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time.

<sup>1</sup> *Sumner v. Walker*, 30 Fed. Rep. 261; *The Maggie Hammond v. Morland*, 76 U. S. 9 Wall. 435, 19 L. ed. 772.

<sup>2</sup> *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500.

<sup>3</sup> *Briddon v. Great Northern R. Co.* 28 L. J. Exch. 51.

<sup>4</sup> *Great Northern R. Co. v. Taylor*, 35 L. J. C. P. 210.

<sup>5</sup> *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 173.

<sup>6</sup> *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Hund v. Baynes*, 4 Whart. 204, 210, 33 Am. Dec. 54.

<sup>7</sup> *Hudley v. Clarke*, 8 T. R. 259.

In that state of the case, he may, if he deem it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired; provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods, or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery.<sup>1</sup> A shipowner who has agreed by charter-party that his ship shall proceed to a port of discharge and there deliver the cargo, unless prevented by excepted perils, is liable in damages for abandoning the voyage, without consent of the charterers, at a port of refuge into which the ship is obliged to put for repairs, unless the excepted perils produce such effect as to make it physically impossible, or so clearly unreasonable as to be impossible in a business point of view, to complete the voyage.<sup>2</sup>

A master is guilty of gross negligence, for not having made any effort himself, or requested the aid of others, either to get the steamer off when stranded, or to remove and restore the goods.<sup>3</sup> A steamboat line is liable for damage to bees delivered it for transportation upon the vessel striking a hidden obstruction and filling with water, where the cabin containing the hives of bees floated to the shore, and no effort was made on the part of the master to use care in saving them, although the vessel was insured and was abandoned to the underwriters as a total loss, and the great injury to the bees was the neglect to care for them immediately after the loss.<sup>4</sup> The master cannot abandon his ship and

<sup>1</sup> *The Niagara v. Cordes*, 67 U. S. 21 How. 7, 16 L. ed. 41.

<sup>2</sup> *Assicurazioni Generali v. The Bessie Morris Co.* [1892] 2 Q. B. 652.

<sup>3</sup> *The Niagara v. Cordes*, *supra*.

<sup>4</sup> *Bixby v. Deemar*, 54 Fed. Rep. 718.

cargo upon any grounds when it is practicable for human exertions, skill and prudence, to save them from impending peril.<sup>1</sup>

In cases of careless and cowardly abandonment, the law will presume that well directed efforts would have been successful.<sup>2</sup> If the master is guilty of want of ordinary care of the interest of the shippers, in deserting the vessel after she was stranded, in making no effort to remove the goods from the place of stowage, either ashore or to some part of the vessel where they would have escaped damage by water, he cannot escape liability on account of the peril of the sea.<sup>3</sup> Where proper precautions are neglected,<sup>4</sup> or a vessel is grounded, because a dangerous passage was voluntarily taken,<sup>5</sup> or where, from failure to fumigate the ship, vermin attack the cargo,<sup>6</sup> or any other negligent act causes a loss within the exception,<sup>7</sup> the carrier will be held liable. A tug was held liable for failure to leave a canal boat which she had in tow in a safe place, after finding it necessary to turn back on account of the weather, where the master of the boat objected to the place, and requested to be removed, and the boat actually broke in two, although the testimony is conflicting as to the depth of the water and the soundness of the boat.<sup>8</sup>

Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course may be more apparent afterwards than it could have been to any one at the time.<sup>9</sup> Something must be

<sup>1</sup> *The Niagara v. Cordes*, 67 U. S. 21 How. 7, 16 L. ed. 41.

<sup>2</sup> *Davis v. Garrett*, 6 Bing. 716; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235.

<sup>3</sup> *Chouteaux v. Leech*, 18 Pa. 233, 57 Am. Dec. 602; *Hobart v. Drogan*, 35 U. S. 10 Pet. 108, 9 L. ed. 363; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *The Gentleman*, Olcott, 118; *Cheviot v. Brooks*, 1 Johns. 367; *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470; *Harrington v. Lyles*, 2 Nott & McC. 83; *Shipton v. Thornton*, 9 Ad. & El. 314; *Harris v. Rand*, 4 N. H. 259, 17 Am. Dec. 421; *Tronson v. Dent*, 36 Eng. L. & Eq. 41.

<sup>4</sup> *The Montana*, 17 Fed. Rep. 377.

<sup>5</sup> *The Fred H. Rice*, 40 Fed. Rep. 690.

<sup>6</sup> *Stevens v. Navigazione Generale Italiana*, 39 Fed. Rep. 562.

<sup>7</sup> *Norman v. Binnington*, L. R. 25 Q. B. Div. 475; *The Bergenseren*, 36 Fed. Rep. 700; *The Giglio v. The Britannia*, 31 Fed. Rep. 432; *The Keystone*, 31 Fed. Rep. 412.

<sup>8</sup> *The Charles Runyon*, 46 Fed. Rep. 813.

<sup>9</sup> *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

deferred to the judgment and discretion of the master on such occasions, so that although the circumstances may tend strongly to prove that he misjudged, or was wanting in that fearless, prudent energy which he ought to have displayed, still they must be of decisive character to incline the court to make the decision turn upon that ground.<sup>1</sup> In cases of necessity or calamity during the voyage, the master is by law created an agent, from the necessity of the case, for the benefit of all concerned; and what he fairly and reasonably does under such circumstances, in the exercise of his sound discretion binds all parties in interest.<sup>2</sup>

When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause. Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power Constitutionally exercised. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary.<sup>3</sup>

### § 88. *Care of Goods During Delay.*

Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely, to their place of destination. His obligation as declared by the Supreme Court of the United States, to take all possible care of the goods, still continues, and is by no means discharged or lessened, where it appears that the goods have not perished with the wreck, and certainly not where the

<sup>1</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

<sup>2</sup> *Everett v. Saltus*, 15 Wend. 474; *Miston v. Lord*, 1 Blatchf. 354; *Douglas v. Moody*, 9 Mass. 550; *Searle v. Scovell*, 4 Johns. Ch. 218; *Mumford v. Commercial Ins. Co.* 5 Johns. 262; *Justin v. Bullam*, 1 Salk. 34; *The Gratitude*, 3 C. Rob. Adm. 240.

<sup>3</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

vessel is only stranded on the beach. Such disasters are of frequent occurrence along the sea coast in certain seasons of the year, as well as on the lakes, and it cannot, for a moment, be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier, as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control,—as by the stranding of the vessel—he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence.

An effort was made by able counsel, in *King v. Shepherd*, 3 Story, 358, to maintain the proposition that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities and duties, as a common carrier, still continued, and that he was bound to show that no human diligence, skill, or care, could save the property from being lost by the disaster. Anything short of that requirement is inconsistent with the nature of the original undertaking, and the meaning of the contract, which is universally interpreted by courts of justice. Admit the proposition, and it is no longer true that where there is no provision in the contract of affreightment varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care, except by proving that it was the result of some natural and inevitable necessity superior to all human agency, or of a force exerted by a public enemy.

Kent, Chief Justice, said in *Elliott v. Rossell*, 10 Johns. 7, 6 Am. Dec. 306, decided in 1813, that it has long been settled that a common carrier warrants the delivery of the goods in all but the excepted cases of the act of God and public enemies, and there is no distinction between a carrier by land and a carrier by water; and the same learned Judge also held that the character,

duty, and responsibility of a carrier continues to attach to a master as long as he has charge of the goods. A master, says a learned commentator, should always bear in mind that it is his duty to convey the cargo to its place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty, is an act for which he and his owners may be made responsible. His duty as carrier is not ended until the goods are delivered at the place of destination, or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law.<sup>1</sup> Where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril, in order to discharge himself from responsibility. It is not sufficient without more, to show that the vessel was stranded, to bring the goods within the exception. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged.<sup>2</sup> The rule has been otherwise stated in other courts, and it has been held that where a vessel is stranded and disabled from continuing her voyage, or waterlogged,—the carrier is only responsible for the ultimate delivery of the goods, and for reasonable care in preserving the goods from the effects of storm, bad air, of leakage and of embezzlement.<sup>3</sup> The care demanded under such circumstances of stranding or when, from any other cause, the goods cannot be carried forward, is, it is said, such as a prudent man of intelligence would have observed in taking care of his own property under the same circumstances.<sup>4</sup>

Where delay is caused in the carriage of goods, it is a duty of

<sup>1</sup> *King v. Shepherd*, 3 Story, 349; Abbott, Shipping (8th ed.) 473.

<sup>2</sup> *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

<sup>3</sup> *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 263, 270, 61 Am. Dec. 423, and cases cited.

<sup>4</sup> *Smyrl v. Nolon*, 2 Bail. L. 421, 23 Am. Dec. 146.

the carrier to take due care of them and, if necessary to prevent damage—as where the goods have been wet—to remove them from their packages and dry them, or any other necessary attention indicated by the character of the goods.<sup>1</sup> The fact that a carrier is not liable for damage to goods caused by a flood will not exempt it from liability for negligence in failing to dry them, especially where it had refused to surrender them to the owner on his demand.<sup>2</sup>

Where a train of cars becomes obstructed by a snowstorm, so that a part of them must be left behind without protection; and the conductor is able to select the cars which shall be left and he is advised, that one car contains goods which will be injured by freezing, he is not—as a matter of law—bound to take that car in preference to other cars—of the contents of which he knows nothing;<sup>3</sup> but if a carrier cannot transport all the property received, he may give preference to perishable property over that known not to be perishable,—and this would be his duty.<sup>4</sup> Where lemons and oranges were shipped on board a brig for New York, and the master put into Lisbon for repairs which had become necessary from encountering heavy gales, and the fruit was re-packed the same day, but became worthless, the loss was thrown on the owners of the fruit, as the course pursued by the master was prudent and judicious.<sup>5</sup>

But where, from any cause, the goods become damaged while being carried with other miscellaneous cargo belonging to various shippers, and largely exceeding the amount belonging to the one shipper damaged,—as is the case in river navigation,—the carrier cannot be required to suspend his voyage in order to care for this particular shipment.<sup>6</sup>

<sup>1</sup> *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602; *Bird v. Cromwell*, 1 Mo. 81, 13 Am. Dec. 470; *Peck v. Weeks*, 34 Conn. 145; *Notara v. Henderson*, L. R. 17 Q. B. 225.

<sup>2</sup> *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106.

<sup>3</sup> *Sicetland v. Boston & A. R. Corp.* 102 Mass. 276.

<sup>4</sup> *Marshall v. New York Cent. R. Co.* 45 Barb. 502.

<sup>5</sup> *Lawrence v. Denbreens* ("The Collenburg") 66 U. S. 1 Black, 170, 17 L. ed. 89.

<sup>6</sup> *The Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135; *Notara v. Henderson*, L. R. 5 Q. B. 346, L. R. 7 Q. B. 225.

### § 89. *Contract to Deliver at Specified Date.*

The distinction between a contract and a duty created by law, made in *Paroline v. Jane*, Aleyn, 26, in which the expulsion of a tenant by alien enemies was held not to relieve from his agreement, has been followed in a multitude of subsequent cases establishing the general doctrine that impossibility of performing an absolute promise will not relieve from the obligation. Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of an agreement, a supervening impossibility will not relieve the promisor from liability for failure to perform.<sup>1</sup> An express contract to carry goods and deliver them within the prescribed time is not dissolved by the impossibility of performing it.<sup>2</sup> An inevitable accident will not relieve a carrier from liability on an express contract to deliver goods within a specified time.<sup>3</sup> A railroad company which contracts that a shipment delivered to it for transportation abroad by its own line and a certain vessel shall leave a certain port on a designated day is liable in damages for the failure of the vessel to leave until a later day.<sup>4</sup>

An embargo for an indefinite time will not dissolve, but only suspend, the contract of a ship to carry goods.<sup>5</sup> A hostile embargo will not relieve from liability for breach of an express contract to load a vessel.<sup>6</sup> An embargo will not relieve from an express warranty that a ship will sail on a certain day.<sup>7</sup> Seizure and confiscation of goods in transit on board a ship in a foreign port on the ground that they are contraband goods will not relieve a carrier from an express contract to carry and deliver them.<sup>8</sup> Refusal of the authorities to permit a vessel to receive a cargo on

<sup>1</sup> *Switzer v. Pinconning Mfg. Co.* 59 Mich. 488.

<sup>2</sup> *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Pluce v. Union Exp. Co.* 2 Hilt. 19.

<sup>3</sup> *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

<sup>4</sup> *Richmond & D. R. Co. v. Bedell*, 88 Ga. 591. See *Shulbrick v. Salmoud*, 3 Burr. 1637.

<sup>5</sup> *Ludley v. Clarke*, 8 T. R. 259; *Baylies v. Fettyplace*, 7 Mass. 324.

<sup>6</sup> *Atkinson v. Ritchie*, 10 East, 530.

<sup>7</sup> *Hore v. Whitmore*, 2 Cowp. 784.

<sup>8</sup> *Spence v. Chodwick*, 10 Q. B. 517.



board will not excuse an absolute engagement to take it.<sup>1</sup> A carrier is not relieved from its obligation on a special contract of shipment because the existence of a mob prevents its performance.<sup>2</sup> A strike of laborers does not relieve consignees from liability for failure to unload a ship within the number of days expressly fixed by the bill of lading. A strike of the laborers of both the consignees and shipowners, who were jointly charged with the duty of unloading, does not relieve the consignees from liability for demurrage under a bill of lading indorsed to them which fixes the number of lay days for unloading and allows other days for demurrage, without making any exception of strikes,<sup>3</sup> and one who contracts to furnish a full cargo for a ship is not excused from performance because it is difficult or even impossible.<sup>4</sup> But the rule is otherwise where there is no time fixed for completing the transportation,<sup>5</sup> and the prior destruction of a vessel relieves from liability on a contract to carry.<sup>6</sup>

The rule is that a carrier undertaking to deliver the goods at a fixed time will not be excused, although the delay has been occasioned by uncontrollable circumstances;<sup>7</sup> yet, in order to enforce the obligation, the shipper must not be chargeable with any delay in furnishing the goods at the time agreed upon.<sup>8</sup>

The agent of a railroad company stipulating for the carriage of goods within a limited time, if it be a reasonable one, may bind the company. But the mere statement by the agent of the usual time within which goods reach the destination, will not amount to a contract to deliver the goods within that time.<sup>9</sup> In a contract of a common carrier for the transportation of perishable

<sup>1</sup> *Holyoke v. Depew*, 2 Ben. 334.

<sup>2</sup> *White v. Missouri Pac. R. Co.* 19 Mo. App. 400.

<sup>3</sup> *Budgett v. Binnington* [1891] 1 Q. B. 35.

<sup>4</sup> *Nelson v. Odiorne*, 45 N. Y. 489.

<sup>5</sup> See as illustrating that class of cases, *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.

<sup>6</sup> *Bonsteel v. Vanderbilt*, 21 Barb. 26.

<sup>7</sup> *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142.

<sup>8</sup> *Fowler v. Liverpool & G. W. Steam Co.* 87 N. Y. 190.

<sup>9</sup> *Strohn v. Detroit & M. R. Co.* 23 Wis. 126, 99 Am. Dec. 114.

goods, a stipulation by the consignee to pay a sum in addition to the regular freight if the property should be delivered by a certain date does not constitute an agreement to deliver the goods by that date.<sup>1</sup> But it has been ruled that a statement of the agent of the carrier in making a contract for shipment of perishable property liable to be injured by freezing as to the time required for transportation, has the force of a contract.<sup>2</sup>

### § 90. *Consequences of Delay.*

If the carrier is guilty of negligence or unnecessary delay, under some of the authorities, or of discrimination in forwarding the goods, he cannot avail himself of the reservation in his favor, if there is loss, through any excepted clause.<sup>3</sup> But it has been ruled that the fact that through the delay of the carrier, goods reached its depot at a time which exposed them to injury from a flood, to which they would not have been exposed but for the delay, will not render the carrier liable.<sup>4</sup> A carrier's delay in not forwarding a carload of goods which was burned on a side track is not the proximate cause of the loss, and the carrier is not liable therefor on account of such delay in shipment, where the fire itself did not occur from any intervening cause that might have been reasonably anticipated and apprehended, and was not due to the carrier's negligence.<sup>5</sup>

Although the bill of lading should provide that the company shall not be held liable "for damage to perishable property of any kind occasioned by delays from any cause," yet there may be liability in respect of delay coming from actual negligence.<sup>6</sup> The carrier may be liable for damage caused by the weather or rust, if occasioned by its negligence, or by unreasonable delay upon the road—although the goods were shipped at the owner's risk.<sup>7</sup> Where a

<sup>1</sup> *Carr v. Schafer*, 15 Colo. 48.

<sup>2</sup> *Blodgett v. Abbott*, 72 Wis. 516.

<sup>3</sup> *Hunnecell v. Taber*, 2 Sprague, 1; *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525.

<sup>4</sup> *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645.

<sup>5</sup> *Reid v. Evansville & T. H. R. Co.* (Ind. App.) Dec. 15, 1893.

<sup>6</sup> *Wabash, St. L. & P. R. Co. v. Jaggerman*, 115 Ill. 407.

<sup>7</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

voyage is broken up by reason of the inexcusable delay of the ship, resulting in damage to the shipper, he need not pay the freight.<sup>1</sup>

Mere failure to give notice of detention by a flood will not render the carrier liable, where delivery was made as soon as possible, and notice would not have benefited the consignee.<sup>2</sup> If a carrier claims that its liability to a shipper depends upon notice of a given fact, it is incumbent upon it, when the notice was to be given to one of its officers or agents, to show that it had an officer or agent at or near the place where the notice was to be given.<sup>3</sup> The court was equally divided as to whether, under a contract of carriage requiring written notice of loss or damage to be given to the station agent at or nearest to the place of delivery within a certain time after delivery of the goods, notice of loss of part of the consignment should be given within the time limited, after the delivery of the goods which arrived safely.<sup>4</sup> A carrier is not liable for damages arising from delay in shipment, which result by reason of special circumstances known to it, unless such circumstances were known to it at the time the contract of shipment was entered into.<sup>5</sup>

Where delay is caused by the reckless act of a third party, the carrier will not be liable unless it has made itself responsible by express contract as an insurer to deliver within a limited time.<sup>6</sup> Mere delay of a common carrier in delivering goods delivered to it for transportation does not amount to a conversion entitling the consignee to refuse to receive them.<sup>7</sup> A carrier is liable for loss upon nursery stock by its freezing, while it is withheld from the consignee under an unjustifiable claim for freight in excess of that specified in the bill of lading issued by a connecting carrier having a right to make a through rate, and which is ex-

<sup>1</sup> *Hoadley v. The Lizzie*, 39 Fed. Rep. 44.

<sup>2</sup> *Norris v. Savannah, F. & W. R. Co.*, 23 Fla. 182.

<sup>3</sup> *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 4 L. R. A. 801.

<sup>4</sup> *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. 543, 42 Am. & Eng. R. Cas. 468.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Gilbert*, 4 Tex. Civ. App. 369.

<sup>6</sup> *Conger v. Hudson River R. Co.* 6 Duer, 375.

<sup>7</sup> *Baumbach v. Gulf, C. & S. F. R. Co.* 4 Tex. Civ. App. 650.

hibited to its agent, although no tender or demand is made by the consignee.<sup>1</sup> An intermediate carrier, holding goods awaiting the arrival of a back bill of charges, will be liable for damages occasioned by delay.<sup>2</sup> The condition on the back of a through bill of lading, relieving a railway company from responsibility as soon as the goods have been delivered to the next succeeding carrier, is legal and reasonable, and is binding on the shipper, who either has, or from the circumstances is presumed to have, knowledge thereof, and to have accepted the contract subject to such condition.<sup>3</sup>

The failure of the carrier to notify the consignee or the revenue officer—where goods are subject to duty, and could only be delivered into a bonded warehouse under the superintendence of some revenue officer, upon written notice—and the goods are destroyed by fire, the carrier will be held not to have been discharged by the arrival of the goods at their destination.<sup>4</sup> But, where the carrier is not in fault and the goods are damaged by fire while awaiting the custom house officers, the railroad company is not liable for their injury, as a common carrier.<sup>5</sup> The mere omission of a common carrier, to transport and deliver property to the consignee within a reasonable time, does not necessarily render it liable for its value. The consignee cannot refuse and abandon the property when tendered, because of the delay, and recover its full value, where there is no evidence of the refusal to deliver,—or demand by the consignee. But, the carrier is liable for the damages caused by unnecessary delay, where there has been a deterioration and loss.<sup>6</sup>

The owner is entitled to a full indemnity, but not necessarily to the full value of the goods, where they have been offered to him and refused.<sup>7</sup> One claiming to be consignee, producing no

<sup>1</sup> *Milton v. Denver & R. G. R. Co.* 1 Colo. App. 307.

<sup>2</sup> *Michaels v. New York Cent. R. Co.* 20 N. Y. 564, 86 Am. Dec. 415.

<sup>3</sup> *Beaumont v. Canadian Pac. R. Co.* 5 Mont. L. Rep. (Sup. Ct.) 255.

<sup>4</sup> *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613.

<sup>5</sup> *Milligan v. Grand Trunk R. Co.* 17 U. C. C. P. 115.

<sup>6</sup> *Scovill v. Griffith*, 12 N. Y. 509; *Davis v. Garrett*, 6 Bing. 716; *Edis v. Turner*, 8 T. R. 531.

<sup>7</sup> *Scovill v. Griffith*, *supra*.

authority from the consignor for the delivery of the goods to him,—although they are marked with his initials—the goods not being accompanied by a bill of lading or instructions, cannot maintain an action against the carrier for failure to forward.<sup>1</sup>

Unless a carrier uses reasonable diligence in shipping goods, it will be liable for damages resulting.<sup>2</sup> For delay in forwarding goods, where no particular place of destination was named, the end of the route of the carrier will be the place where the damages for delay are to be appraised.<sup>3</sup> The general rule is that where goods are delivered in the usual way to a carrier for transportation, and there is a negligent delay in delivering them, the measure of damages is the diminution in the market value of the goods between the time when they ought to have been delivered and the time when they were in fact delivered.<sup>4</sup> To recover of a common carrier damages for mere delay in performing the contract of carriage, the value of such goods at the place of destination when they ought to have arrived should appear, and also their value when they did arrive; the difference between these values being generally the measure of damages.<sup>5</sup>

Where there has been delay, merely in the delivery of the goods to the consignee by a common carrier, and not a conversion of them, the measure of damages is ordinarily the difference between the value of the goods when they were delivered and when they should have been delivered, to which may be added reasonable expenses caused by the delay.<sup>6</sup> These cases are put upon the ground that the duty of the carrier is the measure of his liability; that his duty is to carry the goods to the end of his line, and that any future risks to which the goods may be exposed are not within the contemplation of the parties or the

<sup>1</sup> *Finn v. Western R. Corp.* 102 Mass. 283.

<sup>2</sup> *Rome R. Co. v. Sullivan*, 32 Ga. 400; *Kent v. Hudson River R. Co.* 22 Barb. 278.

<sup>3</sup> *Marshall v. New York Cent. R. Co.* 45 Barb. 502.

<sup>4</sup> *Ingledeu v. Northern R. Co.* 7 Gray, 86; *Outting v. Grand Trunk R. Co.* 13 Allen, 381; *Scott v. Boston & N. O. S.S. Co.* 106 Mass. 468; *Harcey v. Connecticut & P. R. Co.* 124 Mass. 421. 26 Am. Rep. 673.

<sup>5</sup> *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 602.

<sup>6</sup> *Baltimore & O. R. Co. v. Donnell*, 49 Ohio St. 489; *St. Louis, I. M. & S. R. Co. v. Mudford*, 44 Ark. 439.

scope of their contract. But a different rule prevails where the parties make a special contract which provides for certain risks to which the goods are exposed on the connecting line. Thus where the parties made a special contract by which the Boston & Maine Railroad Company agreed to deliver apples to the Maine Central Railroad by a fixed time, so that they would arrive in Bangor in the afternoon of the 23d day of February, both parties knew that the apples were not to be sold in Portland, but were to be forwarded to Bangor; and the special contract was made for the purpose of avoiding the danger of the apples freezing on the connecting line. This risk was anticipated, and contemplated by the parties; and if the danger which it was intended to provide against was incurred by reason of the negligent failure of the defendant to perform its contract, it ought to be responsible in damages. The damages are not too remote. If the freezing had occurred on the defendant's line, it cannot be doubted that the law would regard the delay as the proximate cause of the damage. It is none the less so because it happened on a connecting line. The damage was not caused by any extraordinary event, subsequently occurring, but was caused by an event which was, according to the common experience, naturally and reasonably to be expected—a change of temperature.<sup>1</sup> A carrier is liable to the shipper for a fall in the market value of his goods occasioned by delay which is due to the fault of the carrier, where it was contemplated that the goods would be sold at the first possible market day after arrival.<sup>2</sup>

It is not necessary for the owner of freight to give the carrier notice, at the time of shipment, that loss of wages paid the owner's employes will result from delay in delivering the same, in order to recover the amounts so paid, in an action to recover the statutory penalty for withholding the delivery of such freight on payment of the freight charges shown by the bill of lading.<sup>3</sup>

A carrier who has been guilty of negligence and unreasonable delay in forwarding a cargo, cannot escape liability for deteriora-

<sup>1</sup> *Fox v. Boston & M. R. Co.* 1 L. R. A. 702, 148 Mass. 220.

<sup>2</sup> *The Caledonia*, 43 Fed. Rep. 681.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 259.

tion thereof because of any advance in price during the delay. The measure of damages is the difference at the time of delivery between the value of the goods in sound condition and the actual value in their damaged condition. A carrier cannot complain that a cargo of prunes damaged by reason of his neglect in forwarding them was not sold immediately on delivery where they were sold within a month thereafter in an honest attempt to secure the highest possible price; especially where it is not shown that they would have brought more if they had been sold earlier.<sup>1</sup>

A vessel is liable for the keep and loss of weight on cattle and sheep during the delay in sailing after notice to the shipper that she would sail on a certain day.<sup>2</sup> Fixed damages for every 24 hours delay on such a shipment, is only a limit upon the damages for the delay and not for the injury to the shipment<sup>3</sup> So the risk of injuries which animals may receive, and risk of loss by delay, does not cover the loss in the market by a decline in their value.<sup>4</sup> But a shipper of cattle cannot recover damages for delay in the sailing of a vessel on which they are carried, if, after knowing of the delay, they could have been sold without loss.<sup>5</sup> A decree in admiralty, awarding damages to a shipper, will be affirmed on appeal when it does not clearly appear on what grounds the district court based its award, and the proof does not clearly fail to show that the loss was caused by the master's neglect to use proper means for saving the cargo.<sup>6</sup> Where the carrier has violated his contract to furnish transportation at a fixed time, the receipt by the shipper of a bill of lading for the forwarding of the goods at a later day, does not waive his right of action for such violation.<sup>7</sup>

<sup>1</sup> See *Morrison v. I. & V. Florio SS. Co.* 36 Fed. Rep. 569.

<sup>2</sup> *Goldsmith v. Tower Hill SS. Co.* 37 Fed. Rep. 806.

<sup>3</sup> *Place v. Union Exp. Co.* 2 Hilt. 19.

<sup>4</sup> *Sisson v. Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

<sup>5</sup> *Goldsmith v. Tower Hill SS. Co.* 37 Fed. Rep. 806.

<sup>6</sup> *Birby v. Deeman*, 54 Fed. Rep. 718.

<sup>7</sup> *McAbsher v. Richmond & D. R. Co.* 108 N. C. 244.

a. *When Caused by Strikers, etc.*

A common carrier may lawfully stipulate by special contract for exemption from liability for loss occurring by reason of delay in the transportation and delivery of goods, occasioned by a mob or strike or threatened violence to person or property.<sup>1</sup> Delay in the transportation of goods, which is caused solely by a mob, will not render the carrier liable at common law to make good losses arising from a decline in the market price, or from the deterioration in their quality on account of their perishable nature, during time of transit.<sup>2</sup> A railroad company is not liable for a delay in the delivery of goods shipped, due to the interference by strikers and their confederates with the operation of its road.<sup>3</sup>

Where the evidence shows conclusively that the delay was occasioned by no other cause than a *vis major*, a strike and mob violence of such magnitude as required the military forces of the government to overcome, and which was not suppressed without bloodshed, and the evidence not only fails to show any negligence on the part of the carrier, but, on the contrary, does show that it diligently endeavored to forward the shipment over the line of road that was contemplated by both parties at the time of shipment, and that, failing in that, because of the strike, it availed itself of the first opportunity to forward them by the next most practicable and expeditious route to their destination, there is no resulting liability by reason of the delay.<sup>4</sup>

When misconduct of men acting unlawfully, such as incendiaries, mobs, etc., delays the running of trains, the only duty resting upon the carrier, if not otherwise in fault, is to use reasonable diligence to overcome the obstacles interposed, and forward the goods.<sup>5</sup> A railroad company is not liable for a delay in

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Levi*, 8 L. R. A. 323, 76 Tex. 337.

<sup>3</sup> *Missouri Pac. R. Co. v. Levi*, (Tex. App.) Oct. 26, 1889.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89; *Geismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 55 Am. Rep. 837; *Lick v. Rodocanachi* [1891] 2 Q. B. 626; *Haus v. Kansas City, Ft. S. & G. R. Co.* 81 Ga. 792; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457; *Bartlett v. Pittsburg, C. & St. L. R. Co.* 94 Ind. 281.

<sup>5</sup> *Geismer v. Lake Shore & M. S. R. Co.* 102 N. Y. 563, 55 Am. Rep. 837; *Little v. Fargo*, 43 Hun, 233; *Hamilton v. Western, N. C. R. Co.* 96 N. C. 393



transporting and delivering freight, caused by interference with the operation of the road by strikers and their confederates.<sup>1</sup> A carrier is not liable for delays in transportation occasioned by a strike of its employes, accompanied by violence or intimidation which it and the civil authorities are unable to prevent.<sup>2</sup>

But neglect to use all reasonable means to secure the services of new men, where it is possible to do this without peril, will render any exception in favor of the carrier in case of strikes or violent obstruction of traffic unavailable.<sup>3</sup> On this ground it was ruled that a carrier is liable for injury to fruit from a delay in delivery, caused partly by a strike of some of its employes in which there is neither violence nor lawlessness, and partly by the willful disobedience of other employes retained by the company in the performance of their duties.<sup>4</sup>

<sup>1</sup> *Southern Pac. R. Co. v. Johnson* (Tex. App.) 45 Am. & Eng. R. Cas. 338; *Southern Pac. R. Co. v. Stell* (Tex. App.) Jan. 18, 1990; *Missouri Pac. R. Co. v. Leri* (Tex. App.) Oct. 26, 1889.

<sup>2</sup> *Louisville, & N. R. Co. v. Bell*, 13 Ky. L. Rep. 393.

<sup>3</sup> *Blackstock v. New York & E. R. Co.* 20 N. Y. 48; *Pittsburg, Ft. W. & C. R. Co. v. Hazen*, 84 Ill. 36, 25 Am. Rep. 422.

<sup>4</sup> *Central R. & Bkg. Co. v. Georgia Fruit & V. Exch.* (Ga.) 55 Am. & Eng. R. Cas. 606.

## CHAPTER XII.

### NEGLIGENT LOSS OR ILLEGAL CAPTURE OF CARGO.

- § 91. *Negligent Navigation—Collision.*
- § 92. *Recovery for Injury to or Loss of Cargo.*
- § 93. *Damages for Illegal Capture of Cargo.*
- § 94. *Carrier may Recover for Loss of Cargo.*

#### § 91. *Negligent Navigation—Collision.*

As the handling of vessels is undoubtedly attended with risk, what would be ordinary care under less perilous circumstances might be gross negligence in the management, particularly of steam vessels.<sup>1</sup> A schooner which selected the hazardous passage of the Kills, instead of the Narrows, without any necessity therefor, and on being overtaken by a tug and tow, of which it had full notice, was obliged, after passing in front on several tacks, to luff and lose headway, and drop anchor in order to prevent running into the tow, and was carried by the eddy tide on rocks, —is liable for injury to the cargo caused by the stranding.<sup>2</sup> To navigate a steamboat by the use of an uninspected boiler, is to maintain a nuisance, and in an action for damages caused by an explosion of the boiler, proof that it was done in violation of an express statute dispenses with the necessity of proving any other negligence.<sup>3</sup> Innocent parties in case of a collision are entitled to full compensation for the injuries received by their vessel unless it occurred by inevitable accident, provided the amount does not exceed the amount or value of the interest of the other party in the colliding ship, and her freight.<sup>4</sup>

When a third party has sustained injury to his property from the co-operating consequences of ordinary causes, though the per-

<sup>1</sup> *The Syracuse v. Langley*, 79 U. S. 12 Wall. 167, 20 L. ed. 382; *Bill v. Smith*, 39 Conn. 206.

<sup>2</sup> *The Fred H. Rice*, 40 Fed. Rep. 690.

<sup>3</sup> *Van Norden v. Robinson*, 45 Hun, 567.

<sup>4</sup> *The Virginia Ehrman v. Curtis*, 97 U. S. 309, 24 L. ed. 890.

sons producing them may not, by any intentionally concerted action, cause such a result, the injured person is entitled to compensation for his loss from either one or both of them according to the circumstances; and particularly so from the one of the two who had undertaken to convey the property with care and skill to the place of destination, if there shall have been, in doing so, a deficiency in either.<sup>1</sup> In cases of collision, the immediate cause of the injury will not limit the evidence to the *causa causans*.<sup>2</sup> Where, however, the misconduct has been on the part of both vessels, by the admiralty law, the owners of the ship and cargo can only recover a moiety of the damages which they have respectively sustained.<sup>3</sup> It would follow, therefore, that, as the owner of the cargo is not identified with the negligence of the ship in fault in a collision,<sup>4</sup> he may recover a moiety of the damages against the owner of the ship who has negligently come in collision with the ship containing his goods, notwithstanding his ship was equally negligent, and also recover his costs.<sup>5</sup>

Inevitable accident, as in cases upon land, is a good defense to an action for negligence in the management of a ship.<sup>6</sup> Yet, if the defendant's negligence partly contributed to the ultimate accident, the accident itself will not constitute a defense.<sup>7</sup> Extraordinary precautions are not demanded by extraordinary circumstances whether of weather or of any other character.<sup>8</sup> But where the one injured has done all this and exercised such skill as would be exercised by a reasonable man and after looking at

<sup>1</sup> *Camden & A. R. & Transp. Co. v. Brady*, 66 U. S. 1 Black, 62, 17 L. ed. 84.

<sup>2</sup> *Chartered Mercantile Bank of India v. Netherlands India S. Nav. Co.* L. R. 10 Q. B. Div. 521; *Lloyd v. General Iron Screw Collier Co.* 3 Hurlst. & C. 284, 33 L. J. Exch. 269.

<sup>3</sup> *The Milan*, Lush, Adm. 388, 31 L. J. Adm. 105.

<sup>4</sup> *The Milan*, *supra*; *Chartered Mercantile Bank of India v. Netherlands India S. Nav. Co. supra*.

<sup>5</sup> *The City of Manchester*, 5 Prob. Div. 221.

<sup>6</sup> *The Virgil*, 2 W. Rob. Adm. 205; *The Marpesia*, L. R. 4 C. P. 212; *The Thornley*, 7 Jur. 659; *The Shannon*, 2 W. Rob. Adm. 463.

<sup>7</sup> *Austin v. New Jersey S. B. Co.* 43 N. Y. 75, 3 Am. Rep. 663; *Romney Marsh v. Trinity House*, L. R. 5 Exch. 208.

<sup>8</sup> *The Ligo*, 2 Hagg. Adm. 356; *The Girolamo*, 3 Hagg. Adm. 169; *The Perth*, 3 Hagg. Adm. 414; *The Itinerant*, 2 W. Rob. Adm. 236; *The Northampton*, 1 Spinks, 152; *The Virgil*, 2 W. Rob. Adm. 205.

the result itself, it is seen that a different line of conduct might have prevented the collision, this will not render his vessel liable.<sup>1</sup> The maritime law regards a ship as responsible to third persons for her proper navigation, by whomsoever conducted. And when they are injured by faulty navigation of a vessel, it is immaterial what arrangements the owners of the offending vessel may have made in respect to her navigation,—whether by a master and crew engaged by themselves, or by a master and crew engaged by a charterer, to whom the vessel may have been let by a contract of charter, or by a tugboat with which the owners may have contracted for the navigation of the vessel from one place to another.<sup>2</sup> A vessel approaching another must allow a slight margin for the contingencies of navigation,<sup>3</sup> and should keep her course till the other acts intelligibly so as to give some notice of her intentions.<sup>4</sup>

A schooner having but two men on deck in a dense fog is guilty of negligent navigation.<sup>5</sup> Six knots is an immoderate speed for a schooner in a dense fog. Nearly 7 knots is too great a speed in a dense fog for a steamer.<sup>6</sup> A steamer which goes at the rate of 7 knots, while entering the port of New York near the Romer shoals proceeds at her own risk in a fog so dense that a pilot boat cannot be seen more than 100 yards away, and which has no other lookout than the mate, who is occupied with other duties and it is at fault for a collision with a pilot boat which is able to see the steamer from 1000 to 1300 feet away.<sup>7</sup> A schooner being towed through a narrow position having the wheelman's view obstructed, should keep a lookout.<sup>8</sup> The right of way is not the right to run into unnecessary collision.<sup>9</sup> When there is risk of collision, the boat having right of way must stop and back.<sup>10</sup>

<sup>1</sup> *Doucard v. Lindsay*, L. R. 5 C. P. 338.

<sup>2</sup> *The Doris Eckhoff*, 32 Fed. Rep. 555.

<sup>3</sup> *Wells v. Armstrong*, 29 Fed. Rep. 216.

<sup>4</sup> *The B. C. Terry*, 30 Fed. Rep. 711.

<sup>5</sup> *The Nacoochee*, 24 Blatchf. 99, 28 Fed. Rep. 462.

<sup>6</sup> *The Wyanoke*, 40 Fed. Rep. 702.

<sup>7</sup> *The Orizaba*, 57 Fed. Rep. 247.

<sup>8</sup> *The Raritan*, 32 Fed. Rep. 847.

<sup>9</sup> *The Baltimore*, 34 Fed. Rep. 660.

<sup>10</sup> *The C. H. Seuff*, 32 Fed. Rep. 237.

One vessel brought into immediate jeopardy by another's fault is not liable, even if she has not been manœvered with proof of skill and presence of mind.<sup>1</sup> By a dangerous exposure is meant not the mere possibility of injury through some mischance, not reasonably likely to occur, but an exposure that is clearly liable to receive or inflict injury in the ordinary chances, mistakes, and hazards of navigation, such as are to be reasonably apprehended as liable to arise.<sup>2</sup> Where it is shown that some controlling rule of navigation has been disregarded, if such neglect could possibly have contributed to the injury, it will fix the liability.<sup>3</sup>

Infringement of the regulations for preventing collision which will make a vessel liable for a collision under the English Merchant Shipping Act of 1873 (36 & 37 Viet. chap. 85) § 17, must have some possible connection with the collision.<sup>4</sup> Stopping a vessel in accordance with a rule of navigation is not a fault in the master, although it directly contributes to produce a collision. A steamer is at fault for a collision with another in a dense fog, where, after becoming aware of the latter's near proximity and exchanging signals, she continues at her ordinary speed without being under command, so as to be able to stop, after sighting the latter, until too late to avert the disaster.<sup>5</sup> It is in fault for a collision in going ahead, instead of reversing and backing, when the collision is apparently imminent and she is under command, although by doing so, with the wheel hard-a-port, the other vessel strikes the timbers of the paddle box so as to make them a fender and prevent the former from sinking, since by placing the helm in a proper position and going astern her timbers would have served as a guard and the same result have been attained, if the collision was inevitable.<sup>6</sup>

A steamer which, contrary to the usual course of vessels in descending a certain stream, attempts to go through a strong and well known eddy in approaching her landing, instead of

<sup>1</sup> *The Maggie J. Smith v. Walker*, 123 U. S. 349, 31 L. ed. 175.

<sup>2</sup> *The Mary Powell*, 31 Fed. Rep. 622.

<sup>3</sup> *The Arklow*, L. R. 9 App. Cas. 136.

<sup>4</sup> *Eastern SS. Co. v. Smith* [1891] App. Cas. 310.

<sup>5</sup> *The George E. Starr*, 47 Fed. Rep. 749.

going around it and approaching the landing with her head a little up stream, is liable for injuries resulting from running into a vessel moored at her wharf, although just before the collision her helm becomes unmanageable without her fault.<sup>1</sup> A vessel is not at fault for not changing the course required by the rules on meeting another, where the other changes her course when the rules require her to hold it and a collision appears imminent, since it cannot be known but that the other will realize her mistake and alter her helm accordingly; but stopping and reversing is the proper action in such case. A steamship seeing the lights of another steamer in a position indicating that the vessels are meeting end on is not at fault in porting her helm, although the vessels were in fact on crossing courses, she having the other on her starboard bow, since in the latter case she is required to keep out of the way of the other, and may do so by altering her course to starboard.<sup>2</sup>

Error in a vessel which has just escaped a dangerous collision with another which sheered across her course and went aground, in taking too little space astern of the other, so that in coming off a second collision ensues, will not render her responsible for such collision. A fault on the part of a colliding vessel which does not cause or contribute to the collision does not render her responsible therefor. A steamship under steam and also in tow of a tug, which suddenly sheers across the course of a swifter vessel coming up astern is responsible for the collision ensuing. A slow vessel cannot compel a swifter vessel to keep astern, where it appears to the master of the latter that the former, if properly navigated, cannot get in his way.<sup>3</sup>

A steamship whose speed is reduced by accident to her machinery from 11 to 3 or 4 knots, but whose steering power is not otherwise affected, is not "not under command" so as to make proper the carrying of three red lights, under the English Regulations for Preventing Collisions at Sea, art. 5, subs. (a) and is responsible for a collision occurring when carrying such lights;

<sup>1</sup> *The J. E. Trudeau*, 48 Fed. Rep. 847.

<sup>2</sup> *The Thingwalla*, 48 Fed. Rep. 764.

<sup>3</sup> *The City of Macon*, 47 Fed. Rep. 919.

especially when she does not exhibit the side lights required by subs. (c) to be exhibited when making way.<sup>1</sup> The claim of the master of a steamer in collision with another, that the collision was due to the putting of the wheel of the latter hard aport, with her engine driving her ahead, so as to force her laterally against the former's stem, is sufficiently shown to be fallacious by the failure of his own vessel to act in that manner under the same conditions.<sup>2</sup> A steamer will be held liable for a collision nearly head on with a schooner, where the evidence shows that no vigilant attention was paid to the latter by the former, while those on board the latter were vigilant, attentive, and careful, and the steamer was so navigated that each colored light was alternately brought into view, although the angle of collision was such that there may have been some change of course by the schooner *in extremis*.<sup>3</sup> The sudden luffing of a sloop at a time when nothing could prevent a collision will not relieve a steamer which, with abundant room on either side, has come so close as to cause the collision, from liability for the whole damage occasioned.<sup>4</sup>

Of two sailing vessels meeting nearly head on, one sailing close hauled is at fault for a collision in gradually changing her course until she heads so as to thwart the effect of the change made by the other to avoid her, and continuing on such course until within a few lengths of the other vessel, when she makes a final luff; but the other is also at fault, where after her change of course she sees that the light of the former does not change its bearing materially, since such fact should make it evident that she is not keeping out of the track of the former so as to avoid collision.<sup>5</sup> The custom of vessels of the same size and character to navigate the waters of a harbor in a certain manner and at a certain speed, and the fact that the wave produced does not exceed that produced by a high wind, will not relieve an ocean steamship

<sup>1</sup> *The P. Culand* [1892] Prob. 191.

<sup>2</sup> *The George E. Starr*, 47 Fed. Rep. 749.

<sup>3</sup> *The Minnie Smith*, 57 Fed. Rep. 251.

<sup>4</sup> *The Santee*, 48 Fed. Rep. 126.

<sup>5</sup> *The Gypsum Prince*, 57 Fed. Rep. 859.

from liability for damages occasioned to smaller vessels navigating the harbor under circumstances otherwise rendering it safe for them so to do, by the wave produced by her motion.<sup>1</sup>

By a contract for towage services a tug does not become chargeable with the liability of a common carrier, but only with the duty of exercising ordinary care and skill in performing the services.<sup>2</sup> The master of a tug cannot be held negligent, as matter of law, in not anchoring his tow, where the evidence is conflicting as to whether a haze existed, and whether under the conditions of the weather it would have been safe to proceed upon the course, but the question should be submitted to the jury.<sup>3</sup> A tug towing in a harbor is not bound to turn the stern of its tow to the swells cast by an overtaking steamer.<sup>4</sup> A tug with a tow is responsible for a collision resulting from her failure to port her helm after the exchange of one whistle, importing that the boats would pass port to port, with a steam yacht which she meets in the eastward channel of Hell Gate at a point where there is room to do so with safety.<sup>5</sup>

Any fault for a collision in a channel 800 feet wide across which the tide sweeps is that of a tug which, having insufficient power, undertakes to haul two rafts of logs extending 900 feet astern, with knowledge of the course, direction, and force of the tide and the danger of its navigation, rather than that of a foreign sailing vessel in charge of a local pilot, which enters the channel when the tug and tow are on the opposite side from that taken by her and there is no visible obstruction.<sup>6</sup> A vessel in tow of a tug by a hawser is liable, to the exclusion of the tug, for damages from a collision produced by her not following the course of the tug closely, where the latter kept in the proper channel.<sup>7</sup> A steamer with vessels in tow is not guilty of negligence in continu-

<sup>1</sup> *The Majestic*, 48 Fed. Rep. 730.

<sup>2</sup> *The A. R. Robinson*, 57 Fed. Rep. 667.

<sup>3</sup> *Tebo v. Jordan*, 67 Hun, 392.

<sup>4</sup> *The Majestic*, *supra*.

<sup>5</sup> *The Peerless*, 48 Fed. Rep. 844.

<sup>6</sup> *The Carl Gustaf*, 53 Fed. Rep. 846.

<sup>7</sup> *The Ciampa Amelia*, 46 Fed. Rep. 866.



ing her voyage after rounding to in a storm of uncertain duration for the purpose of righting herself and readjusting her deckload.<sup>1</sup> A tug proceeding down stream in a swift current, towing a loaded barge at the rate of 6 miles an hour, and obliged to go 4 miles an hour to retain steerage way, is at fault for a collision with a steam barge which she perceives coming around the lower end of an island, a half mile away, and which signals that she will pass to port between the tug and the island, in failing to starboard her helm and give the barge more room, when it becomes evident that she is having difficulty in making the turn and is making a wide detour. A steam barge which, upon rounding the lower end of an island, with the intention of proceeding up stream in the other channel, undertakes to change the rule of the road and pass to the left of a tug with tow coming down stream, is responsible for a collision resulting from her inability to make the turn,—especially where, after finding out her inability, she does not signal to pass on the starboard side, or stop, or reverse.<sup>2</sup>

Lights on the outside of a tow alongside of a tug are not required where the tug exhibits the usual colored lights and vertical masthead lights.<sup>3</sup> A tug which, having another steamer upon its starboard bow, persists in attempting to cross the latter's bow, instead of keeping out of the way as required by Rule 19 (U. S. Rev. Stat. § 4233), and thereby brings about a collision, while the other steamer keep on its course as required by Rule 23, after having signaled its intention, is liable for the damages caused by the collision.<sup>4</sup> A canal boat fastened outside other boats, in a manner sufficient for all ordinary contingencies, under such circumstances that lines could not be carried to the piers, is not liable for injuries occasioned by her being forced into collision with another boat by a tier of boats breaking loose and driving against her with sufficient force to break her fastenings,—especially when, had she had a line to the pier, it would probably have

<sup>1</sup> *The Wilhelm*, 52 Fed. Rep. 602.

<sup>2</sup> *The Canisteo*, 47 Fed. Rep. 908.

<sup>3</sup> *The Senator D. C. Chase*, 46 Fed. Rep. 874.

<sup>4</sup> *The Emma Kate Ross*, 46 Fed. Rep. 872.

been broken.<sup>1</sup> A large steamer in tow of two tugs, having her master and crew on board and at their stations and participating in the navigation, is jointly liable with the tugs for collision produced by unskillful or negligent navigation; especially where the order immediately occasioning the collision was given by her master, although the pilot of one of the tugs was on board.<sup>2</sup>

A vessel injured by a collision has no lien on the cargo of the other vessel. In case of collision the cargo cannot be appropriated to equalize the loss between the two vessels, although it may belong to the owner of one of them. If the owner is his own freighter, he must abandon the amount of the freight, which he would have paid upon another vessel, according to the price current, but he is not liable if the abandoned cargo belong to himself.<sup>3</sup> Neither a wreck nor its owners are liable for a collision with her while she lies in a harbor in a position dangerous to navigation, without sufficient lights, where the port authority has undertaken the duty of indicating her position so as to secure ships entering the harbor from danger of collision. A ship entering a harbor in which a sunken wreck lies without sufficient lights is not answerable for a collision with such wreck, where she acts with reasonable care and skill upon discovering her peril.<sup>4</sup> Neither Federal nor state statutes, require the owner of a canal boat sunken in the New York channel, to remove it.<sup>5</sup>

## § 92. *Recovery for Injury to or Loss of Cargo.*

Where two vessels, both being in fault, injure a third, a decree should be for one half the damages against each, so far as its separate value extends, and if one half cannot be collected from one, then that the other vessel pay it, to the extent of her sepa-

<sup>1</sup> *The Nora Costello*, 46 Fed. Rep. 869.

<sup>2</sup> *The Express*, 46 Fed. Rep. 860.

<sup>3</sup> *The Bristol*, 29 Fed. Rep. 867.

<sup>4</sup> *The Utopia v. The Primula* [1893] App. Cas. 492.

<sup>5</sup> *Ball v. Berwind*, 29 Fed. Rep. 541.

rate value, beyond the half due from her.<sup>1</sup> The libellant is not bound to join both vessels at fault, nor is his recovery limited to one half the damages against each.<sup>2</sup> Damages are not apportioned in cases of mutual fault as against a third person who suffers loss by collision. Owners of the innocent tow or its cargo may proceed against the two vessels jointly or either of them severally for his entire loss. In such case it is no defense that the other vessel was more grossly at fault.<sup>3</sup>

The rule of damages in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the time and place of shipment, and all charges of lading, insurance and transportation, and interest at six per cent per annum; but without any allowance for the anticipated profits.<sup>4</sup> Interest is allowed in admiralty for damages in collision, and other courts have adopted the admiralty doctrine.<sup>5</sup> The same principle has been applied in other cases in the negligent destruction of property.<sup>6</sup>

Where the goods have no market value at the place of shipment, the rule of damages is their actual value, such as the price they usually bring at the port of destination, with a fair deduction for profits and charges.<sup>7</sup> The market price at the port of

<sup>1</sup> *The Alabama v. De La Casas*, 92 U. S. 695, 23 L. ed. 763, reversing 11 Blatchf. 482; *The City of Hartford v. Rideout*, 97 U. S. 323, 24 L. ed. 930; *The D. S. Gregory*, 2 Ben. 226; *The Monitor*, 3 Biss. 25; *The Sterling v. Petersen*, 106 U. S. 647, 27 L. ed. 98; *The George Washington v. Cavan*, 76 U. S. 9 Wall. 513, 19 L. ed. 787.

<sup>2</sup> *Phoenix Ins. Co. v. The Atlas*, 93 U. S. 302, 23 L. ed. 863, reversing 10 Blatchf. 459, reaffirmed in 4 Ben. 27.

<sup>3</sup> *The Franconia*, 16 Fed. Rep. 149.

<sup>4</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 100; *The Telegraph v. Gordon*, 81 U. S. 14 Wall. 258, 20 L. ed. 807; *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. ed. 35; *The Mary J. Vaughan*, 2 Ben. 47; *The Joshua Barker*, Abb. Adm. 215; *The Ocean Queen*, 5 Blatchf. 495; *Dyer v. National Steam Nav. Co.* 14 Blatchf. 483, 24 Int. Rev. Rec. 198.

<sup>5</sup> *Frazier v. Bigelow Carpet Co.* 141 Mass. 126; *Straker v. Hartland*, 2 Hem. & M. 570; *The Amalia*, 34 L. J. Adm. 21; *The Dundee*, 2 Hagg. Adm. 137; *The Mary J. Vaughan*, 2 Ben. 47; *Parrott v. Knickerbocker Ice Co.* 46 N. Y. 361; *Mueller v. Express Propeller Line*, 61 N. Y. 312.

<sup>6</sup> *Chapman v. Chicago & N. W. R. Co.* 26 Wis. 295, 304, 7 Am. Rep. 81; *Sanborn v. Webster*, 2 Minn. 323; *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.

<sup>7</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 101.

delivery, is the measure of damages, where it appears that the collision prevented the delivery.<sup>1</sup> Expected profits, except where the accident was intentional or malicious, are not allowed,<sup>2</sup> but in cases of willful and malicious collision, expected profits may be allowed, as exemplary damages.<sup>3</sup> Where a vessel is destroyed by a collision, the measure of damages is the value of the vessel and freight.<sup>4</sup> But the full value of a vessel and cargo cannot be recovered where the vessel may be raised and the cargo saved.<sup>5</sup>

### § 93. *Damages for Illegal Capture of Cargo.*

In cases of illegal capture the probable profits of an unfinished voyage broken up are not an item of damages.<sup>6</sup> The measure of damages is the value of the property injured or destroyed, and interest from the time of the trespass, with ten per cent added where sale was under disadvantageous circumstances or not at port of destination.<sup>7</sup> It is the same principle as in cases of collision.<sup>8</sup> At port of destination, ten per cent is not added.<sup>9</sup> Insurance is sometimes a proper item.<sup>10</sup> In willful collision there may be punitive damages.<sup>11</sup> In cases of capture made without probable cause the court may decree damages and costs against the captors on

<sup>1</sup> *The Joshua Barker*, Abb. Adm. 215.

<sup>2</sup> *The Harriet Newhall*, 3 Ware, 105.

<sup>3</sup> *The Newhall*, *supra*; *Ralston v. The State Rights*, Crabbe, 22.

<sup>4</sup> *The Ann Caroline v. Wells*, 69 U. S. 2 Wall. 538, 17 L. ed. 833; *The Rebecca*, Blatchf. & H. 347.

<sup>5</sup> *The Baltimore v. Rowland*, 75 U. S. 8 Wall. 377, 19 L. ed. 463.

<sup>6</sup> *The Lively*, 1 Gall. 325; *The Anna Maria*, 15 U. S. 2 Wheat. 327, 4 L. ed. 252; *The Amiable Nancy*, 16 U. S. 3 Wheat. 546, 4 L. ed. 456.

<sup>7</sup> *Del Col. v. Arnold*, 3 U. S. 3 Dall. 333, 1 L. ed. 624; *La Amistad de Rues*, 18 U. S. 5 Wheat. 385, 5 L. ed. 115; *The Amiable Nancy*, *supra*.

<sup>8</sup> *Williamson v. Barrett*, 54 U. S. 13 How. 101, 14 L. ed. 68; *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. ed. 35; *The New Jersey*, Olcott, 444; *The Narragansett*, Olcott, 246.

<sup>9</sup> *Arthur v. The Cussius*, 2 Story, 81.

<sup>10</sup> *The Anna Maria*, 15 U. S. 2 Wheat. 327, 4 L. ed. 252.

<sup>11</sup> *Ralston v. The State Rights*, Crabbe, 22.

restitution.<sup>1</sup> In cases of recapture, the owners may recover damages for seizure without grounds.<sup>2</sup>

Where the captors consented to restitution, demurrage for the detention was allowed.<sup>3</sup> Demurrage and interest are both allowed in the courts, with no allowance for loss of profits.<sup>4</sup> Demurrage is given for unjustifiable delay by the captors in proceeding to adjudication, but no allowance is made for loss of profits.<sup>5</sup> Demurrage includes reasonable expenses of agent of owners to care for property.<sup>6</sup>

Where the property has been sold and no account of sales rendered, the damages are the prime cost, and ten per cent profit. Where there is an account of sales this is generally the basis of the decree.<sup>7</sup> But where a cargo of coal lying at the bottom of Lake Michigan was raised by the owners of the vessel acting under the advice of counsel, after notice by the owner of the coal of his claim of title, and was disposed of in Chicago at private sale, the owner of the cargo was entitled to recover its value, less the necessary expense of raising it and carrying it ashore by the most improved appliances for that purpose.<sup>8</sup>

The captors are substituted for the owners, and are liable for the freight and cargo, and in case of restitution, the neutral carrier is entitled to freight, where the capture prevented the vessel from earning the same;<sup>9</sup> but not if the property was ultimately

<sup>1</sup> *Glass v. The Betsey*, 3 U. S. 3 Dall. 16, 1 L. ed. 489; *The Isabella Thompson v. United States*, 70 U. S. 3 Wall. 155, 18 L. ed. 55.

<sup>2</sup> *Miller v. The Resolution*, 2 U. S. 2 Dall. 19, 1: 263; *The British Consul v. Thompson*, Bee, 144; *The Nemesis*, Edw. Adm. 50; *The Hoppet*, Edw. Adm. 369; *The Mercurius*, 1 C. Rob. Adm. 80.

<sup>3</sup> *The Corier Maritimo*, 1 C. Rob. Adm. 241; *The Zee Star*, 4 C. Rob. Adm. 71; *The St. Juan Baptista*, 5 C. Rob. Adm. 36.

<sup>4</sup> *Talbot v. Janson*, 3 U. S. 3 Dall. 133, 1 L. ed. 540; *The Lively*, 1 Gall. 323.

<sup>5</sup> *Maley v. Shattuck*, 7 U. S. 3 Cranch, 458, 2 L. ed. 498; *The Corier Maritimo*, *supra*; *The Zacheman*, 5 C. Rob. Adm. 152.

<sup>6</sup> *United States v. The Nuestra Senora de Regla*, 108 U. S. 92, 27 L. ed. 662.

<sup>7</sup> *The Lucy*, 3 C. Rob. Adm. 208; *The Narcissus*, 4 C. Rob. Adm. 17; *The Lively*, *supra*; *The Catharine v. Dickinson*, 58 U. S. 17 How. 170, 15 L. ed. 233; *The Empire State*, 2 Ben. 179.

<sup>8</sup> *Murphy v. Dunham*, 38 Fed. Rep. 503.

<sup>9</sup> *The Frances*, 12 U. S. 8 Cranch, 418, 3 L. ed. 609; *The Societe*, 13 U. S. 9 Cranch, 209, 3 L. ed. 707; *The Antonia Johanna*, 14 U. S. 1 Wheat. 159, 4 L. ed. 60; *The Commercen*, 14 U. S. 1 Wheat. 382, 4 L. ed. 118, 2 Gall. 264; *The Ann Green*, 1 Gall. 294.

bound to the same market where the captors carried the ship,<sup>1</sup> nor where the ship is carrying contraband;<sup>2</sup> nor where the carrier is guilty of fraudulent suppression or spoliation of papers;<sup>3</sup> nor where he has engaged in the coasting or colonial trade of the enemy.<sup>4</sup>

Full freight will be decreed although only part of the goods was received, if the loss is owing to the negligence of the prize master.<sup>5</sup> The captor takes the prize *cum onere* and in ordinary cases, freight is a privileged lien.<sup>6</sup> On an illegal seizure, the original wrongdoers may be made responsible, beyond the loss actually sustained, in case of gross and wanton outrage; but the owners of the privateer, who are only constructively liable, are not bound to the extent of vindictive damages.<sup>7</sup>

#### § 94. *Carrier May Recover for Loss of Cargo.*

The owner and master is the bailee of the cargo, and so responsible to the shippers or insurers for the safe transportation and delivery thereof; and to fulfill his obligations and secure his reward, he is entitled to possession and may maintain an action for its destruction.<sup>8</sup> The owners of a vessel wrongfully injured by a collision may recover for injury done to the cargo,<sup>9</sup> to its full value if totally lost.<sup>10</sup>

The delivery of goods to a carrier for transportation vests in him a special property which authorizes him to maintain an action

<sup>1</sup> *The Vrow Henrica*, 4 C. Rob. Adm. 343; *The Ann Green*, *supra*.

<sup>2</sup> *The Commercen*, 14 U. S. 1 Wheat. 382, 4 L. ed. 118, 2 Gall. 264; *The Mercurius*, 1 C. Rob. Adm. 80; *The Sarah Christina*, 1 C. Rob. Adm. 237.

<sup>3</sup> *The Commercen*, *supra*.

<sup>4</sup> *The Immanuel*, 2 C. Rob. Adm. 186; *The Minerva*, 3 C. Rob. Adm. 34; *The Anna Catharina*, 4 C. Rob. Adm. 107.

<sup>5</sup> *The Der Mohr*, 3 C. Rob. Adm. 129.

<sup>6</sup> *The Bremen Flugge*, 4 C. Rob. Adm. 90; *The Vrow Henrica*, 4 C. Rob. Adm. 347.

<sup>7</sup> *The Amiable Nancy*, 16 U. S. 3 Wheat. 546, 4 L. ed. 456.

<sup>8</sup> *Commercial Transp. Co. v. Fitzhugh*, 66 U. S. 1 Black, 582, 17 L. ed. 110; *Newell v. Norton*, 70 U. S. 3 Wall. 267, 18 L. ed. 273.

<sup>9</sup> *Commercial Transp. Co. v. Fitzhugh*, *supra*; *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 43, 17 L. ed. 609.

<sup>10</sup> *The Narrangansett*, Olcott, 255; *The Russia*, 3 Ben. 479; *La Tourette v. Burton*, *supra*.

against any person who disturbs his possession or does any injury to the goods. Every bailee has a temporary qualified property in the thing of which possession is delivered to him by the bailor which entitles him to maintain an action against any stranger who injures it; and the reason is because he is answerable over to the bailor, and ought not to be responsible for the loss without being able to resort to the person who was the original cause of the injury.<sup>1</sup> A carrier by vessel for hire, whether strictly a common carrier or not, assumes the ordinary obligations of a common carrier, and is bound to carry the goods shipped to their destination unless prevented by the act of God, or the public enemy, or the act of the shipper, or one of the excepted perils expressed in the contract of shipment.<sup>2</sup> It is just, therefore, that he should be permitted to indemnify himself from a wrongdoer against his liability to the shipper or owner.

In prosecuting the suit against the wrongdoer the carrier does not assume to act as an agent for the owners of the cargo, but he claims to recover the value of the goods lost by virtue of his special property in them as a carrier. It is familiar law that the special right of property conferred by a bailment is sufficient to enable the bailee to recover the full value of the property of a wrongdoer who destroys it—and this whether the bailment is for a consideration, or is merely a naked bailment. Thus a traveler was allowed to recover in trover against a steamboat company the full value of a satchel intrusted to his care by a friend,<sup>3</sup> and the finder of a jewel was permitted to recover its whole value for a conversion by a stranger, in the leading case of *Armory v. Delamirie*, 1 Strange, 505. Inasmuch as the law does not allow a defendant to be vexed twice for the same wrong, a recovery by the person having a special property, and satisfaction by the wrongdoer, discharges the latter from all liability to the owner.<sup>4</sup>

<sup>1</sup> Story, Bailm. § 93.

<sup>2</sup> *The Maggie Hammond v. Morland*, 76 U. S. 9 Wall. 435, 19 L. ed. 772; *La Tourette v. Burton*, *supra*; *The Niagara v. Cordes*, 62 U. S. 21 How. 7, 16 L. ed. 41.

<sup>3</sup> *Moran v. Portland Steam Packet Co.* 35 Me. 55.

<sup>4</sup> *White v. Webb*, 15 Conn. 305; *Smith v. Jones*, 7 Cow. 328; *Harker v. Dement*, 9 Gill. 7, 52 Am. Dec. 670; *Hardman v. Brett*, 2 L. R. A. 173, 37 Fed. Rep. 803.

When he has once made it to the injured parties, he cannot be made liable to another suit, at the instance of any merely equitable claimant.<sup>1</sup>

When the carrier has received the money in question from the party in fault he thereby absolves them from any further liability to the owner. As is said in the opinion of the court in *La Tourette v. Burton*, 68 U. S. 1 Wall. 43, 51, 17 L. ed. 609, 611, doubtless the owner may intervene and petition the court for the transfer of the money to him at any time before the distribution of the fund in the registry of the court. But he is under no obligation to do this, and is at liberty at any time after his right accrues to bring an action against the carrier and recover the value of the cargo which has not been delivered pursuant to the duty of the carrier. In such an action it cannot be maintained by the carrier with any color of plausibility that he should be permitted to retain or recoup against the demand of the cargo owner, any sum which he might have expended in prosecuting a suit brought for his own protection and indemnity against a wrongdoer by whose act the cargo was lost. Such a defense would be preposterous in a case where the loss of the cargo was caused by the misconduct of the carrier.<sup>2</sup>

Recovery cannot be had from a steamship for the loss occasioned by the dumping of the deck load of a lighter upon encountering her waves, where the lighter was too sharp for the purpose and unsafe for such a cargo because of her form, and the waves were not of a dangerous character or such as to cause a properly constructed lighter properly loaded to dump her cargo.<sup>3</sup>

The value of the cargo is to be estimated from the value at the port of shipment, including expenses of transportation to the place of collision, the lading of the cargo, etc., and interest at six

<sup>1</sup> *The Monticello v. Mollison*, 58 U. S. 17 How. 152, 15 L. ed. 68; *Newell v. Norton*, 70 U. S. 3 Wall. 267, 18 L. ed. 273.

<sup>2</sup> *Hardman v. Brett*, 2 L. R. A. 173, 37 Fed. Rep. 803.

<sup>3</sup> *The Pilgrim*, 57 Fed. Rep. 670.



per cent per annum;<sup>1</sup> interest on the value of the cargo;<sup>2</sup> the value of the cargo at the market price at the home port of the injured vessel at the time it would ordinarily have arrived there;<sup>3</sup> its value at the time and place of shipment, without including loss of profits which would have been realized by completing the voyage.<sup>4</sup> Future profits may be allowed as damages, but speculative and merely possible profits cannot be allowed.<sup>5</sup> The respondent in the action is not presumed to know, or bound to inquire, as to the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done.

<sup>1</sup> *The Monticello v. Mollison*, 58 U. S. 17 How. 152, 15 L. ed. 68; *The Glaucus*, 1 Low. Dec. 371; *The Aleppo*, 7 Ben. 125; *The Anna Maria*, 15 U. S. 2 Wheat. 327, 4 L. ed. 252; *The Ocean Queen*, 5 Blatchf. 494; *Smith v. Condry*, 42 U. S. 1 How. 28, 11 L. ed. 35; *The Lively*, 1 Gall. 315; *Seaman v. The Crescent City*, 1 Bond, 123; *The Mary J. Vaughan*, 2 Ben. 50, 81 U. S. 14 Wall. 258, 20 L. ed. 807.

<sup>2</sup> *The Apollon*, 22 U. S. 9 Wheat. 362, 6 L. ed. 111; *The Anna Catharina*, 6 C. Rob. Adm. 10.

<sup>3</sup> *Swift v. Brownell*, 1 Holmes, 467; *The Joshua Barker*, Abb. Adm. 215.

<sup>4</sup> *The Mary J. Vaughan*, 2 Ben. 47; *Smith v. Condry*, 42 U. S. 1 Hun, 28, 11 L. ed. 35.

<sup>5</sup> *The Mayflower*, 1 Brown, Adm. 387; *Lacour v. New York*, 3 Duer, 406; *St. John v. New York*, 6 Duer, 315; *Walter v. Post*, 6 Duer, 363; *Allison v. Chandler*, 11 Mich. 542; *Sewall's Falls Bridge v. Fisk*, 23 N. H. 171; *Griffin v. Coicer*, 16 N. Y. 489, 69 Am. Dec. 718; *Desty, Ship. & Adm.* § 401.

## CHAPTER XIII.

### TRANSPORTATION BY CARRIER OVER CONNECTING LINES.

- § 95. *Liability for Goods to be Transported beyond Termination of Line.*
- § 96. *Carrier may Restrict Liability to its own Line.*
- § 97. *May Contract for Freight and Transportation beyond its own Line.*
- § 98. *Must Deliver Goods to Connecting Carrier.*
- § 99. *Contract for Through Carriage.*
- § 100. *Contract by Agent for Through Carriage.*

#### § 95. *Liability for Goods to be Transported beyond Termination of Line.*

The English rule is that the receipt of goods by a carrier directed to a point beyond his line, creates a contract to transport them safely to their destination.<sup>1</sup> If a part of the carriage extends beyond the carrier's own line he will be liable unless he limits the liability beyond his own line; but he may agree to assist in forwarding beyond that point.<sup>2</sup>

There is no privity of contract between connecting carriers and a shipper of goods, where the initial carrier undertook to transport the goods to their destination. A contract by an initial carrier to carry goods over its own and connecting lines to their destination, providing that it shall not be liable for loss or damage occurring after the goods shall have arrived at the stations on the initial carrier's line nearest to the points to which they

<sup>1</sup> *Mutton v. Midland R. Co.* 4 Hurlst. & N. 615; *Scothorn v. South Straffordshire R. Co.* 8 Exch. 341; *Watson v. Ambergate, N. & B. R. Co.* 3 Eng. L. & Eq. 497; *Crouch v. Great Western R. Co.* 2 Hurlst. & N. 491, 3 Hurlst. & N. 183; *Bristol & E. R. Co. v. Collins*, 5 Hurlst. & N. 969, 7 H. L. Cas. 194; *Coxon v. Great Western R. Co.* 5 Hurlst. & N. 274; *Muschamp v. Lancaster & P. J. R. Co.* 8 Mees. & W. 421; *Collins v. Bristol & E. R. Co.* 11 Exch. 790; *Wilby v. West Cornwall R. Co.* 2 Hurlst. & N. 703; *Webber v. Great Western R. Co.* 3 Hurlst. & C. 771.

<sup>2</sup> *Foncles v. Great Western R. Co.* 7 Exch. 699; *Bristol & E. R. Co. v. Collins*, *supra*.

are consigned, or beyond its limits, will not relieve it from liability for loss or damage occurring during transportation beyond the limits of its own and on a connecting line. But the court having reached the above conclusions was equally divided as to whether, under a contract to carry goods to their final destination, the initial carrier not to be responsible for any loss or damage occurring after the arrival of the goods at the stations on the initial carrier's line nearest the points to which they are consigned or beyond its limits, the initial carrier was liable for a loss of the goods after their arrival at their destination and before delivery to the consignee.<sup>1</sup> In England carriers are liable for loss or damage to goods until they are delivered at their place of destination, unless restricted by contract; and this although they are destined to a point beyond the realm. But in this country carriers' liability is held to be restricted to their own route unless otherwise provided by contract.<sup>2</sup> The Carney act of Parliament of 1830, protects the carrier, although the goods are to be carried beyond their termination.<sup>3</sup> A carrier is not responsible for damage to goods on a connecting line, where the bill of lading specially limits the carrier's liability to its own line.<sup>4</sup>

The American rule, except in a few states, is that the receipt of goods by the carrier directed to a point beyond the terminus implies merely an undertaking by the common carrier to deliver them to the next succeeding carrier, and that, after the safe delivery to the next carrier in the regular course of transportation, he is not liable for damage.<sup>5</sup>

<sup>1</sup> *Grand Trunk R. Co. v. McMillan*, 16 Can. Sup. Ct. Rep. 543, 42 Am. & Eng. R. Cas. 468.

<sup>2</sup> *Hadd v. United States & C. Exp. Co.* 52 Vt. 342, 36 Am. Rep. 757.

<sup>3</sup> *Morrill v. North Eastern R. Co.* L. R. 1 Q. B. Div. 302, 45 L. J. Q. B. 289.

<sup>4</sup> *Grand Trunk R. Co. v. McMillan*, *supra*.

<sup>5</sup> *Louisville, N. A. & C. R. Co. v. Hart*, 4 L. R. A. 549, 119 Ind. 273; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *McConnell v. Norfolk & W. R. Co.* 86 Va. 248; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Reed v. United States Exp. Co.* 48 N. Y. 462, 7 Am. Rep. 561; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Lawrence v. Winona & St. P. R. Co.* 15 Minn. 390, 2 Am. Rep. 130; *Raisson v. Holland*, 5 Daly, 155, affirmed in 59 N. Y. 611, 18 Am. Rep. 394; *American Exp. Co. v. Second Nat. Bank*, 69 Pa. 394, 8 Am. Rep. 268; *Skinner v. Hall*, 60 Me. 477; *Perkins v. Portland, S. & P. R. Co.* 47 Me. 573, 74 Am. Dec. 507; *Grindle v. Eastern Exp. Co.* 67 Me. 317, 24 Am.

The liability resting upon a carrier is discharged when he has, in the regular course of business, transferred the possession of the goods to the connecting carrier to complete their transportation. Of course, outside of the law of carriers, the duty may have been assumed and the responsibility incurred by contract, which will not be discharged by such delivery. If the carrier has assumed to transport goods to their destination, or to be responsible for the negligence of the connecting carrier,—he must answer under his contract. But, such a contract must be distinctly shown.<sup>1</sup> Unless there be either an express contract or one fairly implied from the circumstances under which the transportation is undertaken, to transport beyond the carrier's own line, it will be discharged when the goods are delivered to a connecting carrier.<sup>2</sup> The receipt by a carrier of goods marked for transportation over another line, with which the carrier connects—but with which it has no business relations,—and the acceptance of transportation only over its own line without any special contract, has been held not to render the carrier liable after delivery to the connecting carrier.<sup>3</sup>

Charging a through rate of freight on stock to be transported

Rep. 31; *Mullarky v. Philadelphia, W. & B. R. Co.* 9 Phila. 114; *Hood v. New York & N. H. R. Co.* 22 Conn. 1; *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 168, 96 Am. Dec. 510; *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 177; *McMillan v. Michigan, S. & N. I. R. Co.* 16 Mich. 79, 93 Am. Dec. 208; *Craigford v. Southern R. Asso.* 51 Miss. 222, 24 Am. Rep. 626; *Carter v. Peck*, 4 Sneed, 203, 67 Am. Dec. 604; *Brintnall v. Saratoga & W. R. Co.* 32 Vt. 665; *Jenneson v. Cumden & A. R. & Transp. Co.* (Pa.) 4 Am. L. Reg. 234; *Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co.* 70 Mo. 672, 35 Am. Rep. 444; *Hudd v. United States & C. Exp. Co.* 52 Vt. 342, 36 Am. Rep. 757.

<sup>1</sup> *Van Buskirk v. Roberts*, 31 N. Y. 661; *Pennsylvania R. Co. v. Berry*, 68 Pa. 272; *Root v. Great Western R. Co.* 45 N. Y. 524; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77; *Newell v. Smith*, 49 Vt. 255; *East Tennessee & G. R. Co. v. Nelson*, 1 Coldw. 276; *Illinois Cent. R. Co. v. Johnson*, 34 Ill. 389; *Noyes v. Rutland & B. R. Co.* 27 Vt. 110; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan. 505; *Peet v. Chicago & N. W. R. Co.* 19 Wis. 119; *Bryan v. Memphis & P. R. Co.* 11 Bush, 597; *Wahl v. Holt*, 26 Wis. 703; *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 333.

<sup>2</sup> *United States Exp. Co. v. Rush*, 24 Ind. 403; *Pendergrast v. Adams Exp. Co.* 101 Mass. 120; *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110; *American Exp. Co. v. Second Nat. Bank of Titusville*, 69 Pa. 394, 8 Am. Rep. 268.

<sup>3</sup> *Nutting v. Connecticut River R. Co.* 1 Gray, 502.

over two or more roads will not render the initial carrier liable for the acts and negligences of other carriers, where its contract expressly exempts it from such liability.<sup>1</sup> The implied obligation of the carrier to the public is limited by the termini of its own route.<sup>2</sup> In the absence of a special contract to deliver goods at a point beyond its line, the receiving carrier is not liable for loss or damage occurring to the goods after their delivery to the connecting carrier.<sup>3</sup> Each of several carriers over whose lines property delivered to one of them for transportation must pass to its destination, is liable only for loss or injury thereto occurring on its own line, and is not liable for loss of the property before delivery to it, in the absence of any agreement or arrangement constituting all the carriers partners or joint undertakers.\*

A carrier is not liable for the nondelivery of goods received by it for shipment to a point on the line of a connecting road over which it has no control, if the goods are delivered to such connecting road in good condition, unless it expressly contracts to transport the goods to the point of destination.<sup>5</sup> It is not liable for a delay in the transportation of freight caused by its connecting lines, in the absence of negligence on its own part, where no partnership between it and such other lines and no other facts exist, rendering it responsible for delay on the part of other carriers.<sup>6</sup> Except in a few states, it is conclusively established, as a principle of law in this country that a carrier, in the absence of a special contract, express or implied, for the safe carriage of goods to their destination, is only bound to carry safely to the end or his line, and there duly deliver to the next carrier in his route.<sup>7</sup>

<sup>1</sup> *Gulf, W. T. & P. R. Co. v. Griffith* (Tex. Civ. App.) Dec. 21, 1893.

<sup>2</sup> *Pittsburg, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682.

<sup>3</sup> *McConnell v. Norfolk & W. R. Co.* 86 Va. 248.

<sup>4</sup> *Church v. Atchison, T. & S. F. R. Co.* 1 Okla. 44.

<sup>5</sup> *Illinois C. R. Co. v. Kerr*, 68 Miss. 14; *Crouch v. Louisville & N. R. Co.* 48 Mo. App. 248.

<sup>6</sup> *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86.

<sup>7</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325; *Knight v. Providence & W. R. Co.* 13 R. I. 572, 43 Am. Rep. 46; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 358; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Harris v. Grand Trunk R. Co.* 15 R. I. 371; *Clyde v. Hubbard*, 88 Pa. 358; *Goldsmith v. Chicago & A. R. Co.* 12 Mo. App. 479; *Crawford v. Southern R. Asso.* 51 Miss. 222, 24 Am. Rep. 626.

In the absence of a special contract a common carrier's liability for goods ends with delivery to a connecting line.<sup>1</sup> If the consignor insists upon the carrier delivering goods at a point beyond its own line of road, it is not the duty of the carrier to receive the goods at stations along its line for transportation.<sup>2</sup> The rule of law is well settled in most of the state courts, that although a railroad corporation may contract to carry beyond its own line, yet it requires an express contract so to bind it. Such contract is not to be inferred from its sharing in a through freight,<sup>3</sup> nor from its receiving and transporting the goods over its line in the course of a continuous passage under an agreement for a through freight.<sup>4</sup>

Generally a common carrier is not liable for losses sustained beyond the terminus of its own line, unless it has assumed such liability by express contract or some arrangement in the nature of a partnership exists between it and the connecting carriers.<sup>5</sup> Any implied obligation of the carrier to the public is limited by the termini of his own route.<sup>6</sup> There is no common law responsibility devolving upon any carrier to transport goods over other than its own lines.<sup>7</sup> The liability of a railroad company for the safe carriage of goods beyond the terminus of its own line depends upon its special contracts, express or implied; in the absence of special contract the railroad company receiving goods for transportation beyond its own line is liable only to the extent of its own road, and for the safe storage and delivery to the next carriers.<sup>8</sup>

<sup>1</sup> *Wichita Valley R. Co. v. Swenson* (Tex. Civ. App.) Jan. 23, 1894.

<sup>2</sup> *People v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631.

<sup>3</sup> Woods, *Railway Law*, 1573.

<sup>4</sup> *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *North v. Merchants & M. Transp. Co.* 146 Mass. 315; *Root v. Great Western R. Co.* 45 N. Y. 530; *Faulkner v. Hart*, 82 N. Y. 422, 37 Am. Rep. 574; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500.

<sup>5</sup> *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep. 247; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *Sumner v. Walker*, 30 Fed. Rep. 261; *Ray Passenger Carriers*, § 148, 150, 151, 152, 158.

<sup>6</sup> *Pittsburg, C. & St. L. R. Co. v. Moulton*, 61 Ind. 539, 28 Am. Rep. 682.

<sup>7</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325.

<sup>8</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679.

If a contract by a carrier for transportation is invalid, the liability of a connecting carrier by whose negligence the goods are lost or damaged must be determined under the principles of the public law.<sup>1</sup> The requirements by a carrier in receiving goods for transportation to a point beyond its own lines, that the shipper guarantee payment of the freight through to the point of destination, is not conclusive that it agrees to deliver the goods at the point of destination.<sup>2</sup> A bill of lading for the transportation of goods from H. to G. in Texas, and for the delivery at the latter place to the consignee or a connecting carrier, is not a contract for carriage beyond that place, notwithstanding that it guarantees a through rate of freight to a town in Connecticut, which is named in it as the ultimate point of destination.<sup>3</sup> Each of several carriers over whose lines property delivered to one of them for transportation must pass to its destination is liable only for loss or injury thereto occurring on its own line, and is not liable for loss of the property before delivery to it, in the absence of any agreement or arrangement constituting all the carriers partners or joint undertakers.<sup>4</sup> A carrier is not liable for injury to goods received by it from a connecting carrier in bad condition, and delivered in the same condition.<sup>5</sup>

A receipt which shows that freight is consigned to the order of M, and that B at a place beyond the carrier's own line is to be notified, does not of itself, make a contract to carry to such place.<sup>6</sup> Where plaintiff knew that the railroad to which he delivered his goods did not reach the destination indicated, the omission in the receipt of the name of the point where the road formed its connection with another road, is unimportant.<sup>7</sup>

It has been held in Connecticut—ignoring the late English cases—that neither the receiving goods for transportation marked to a

<sup>1</sup> *Woodburn v. Cincinnati, N. O. & T. P. R. Co.* 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 514.

<sup>2</sup> *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14.

<sup>3</sup> *Bennitt v. Missouri Pac. R. Co.* 46 Mo. App. 656.

<sup>4</sup> *Church v. Atchison, T. & S. F. R. Co.* 1 Okla. 44.

<sup>5</sup> *Goodman v. Oregon R. & Nav. Co.* 22 Or. 14, 49 Am. & Eng. R. Cas. 87.

<sup>6</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325.

<sup>7</sup> *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110.

place beyond the line of the carrier, nor a receipt stating that the goods were so received, nor an advertisement setting forth the facilities possessed by the carrier for transportation, will constitute evidence of a special contract to do more than deliver the goods to the next succeeding carrier.<sup>1</sup> A notice on the margin of a receipt that goods consigned to any place beyond the company's line, will be sent forward by the carrier in the usual manner, the company acting for that purpose as the agent of the consignor or consignee, and not as carrier, tends to rebut any assumed inference of a contract for through carriage from the receipt of the goods, to any place beyond the road of the company.<sup>2</sup>

The general doctrine as to transportation by connecting lines, recognized by the Supreme Court of the United States,—and also by the majority of the state courts,—although a different rule has been adopted in England,<sup>3</sup> amounts to this: that each road confining itself to its common law liability, is only bound, in the absence of a special contract to safely carry over its own road and safely transfer to the next connecting carrier;—but, that one of the companies may agree, that its liability shall extend over the whole route. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language,—but only from clear and satisfactory evidence.<sup>4</sup>

<sup>1</sup> *Elmore v. Naugatuck R. Co.* 23 Conn. 457, 63 Am. Dec. 143.

<sup>2</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325.

<sup>3</sup> *Muschamp v. Lancaster & P. J. R. Co.* 8 Mees. & W. 421; *Scothorn v. South Staffordshire R. Co.* 8 Exch. 341; *Collins v. Bristol & E. R. Co.* 11 Exch. 790; *Wilby v. West Cornwall R. Co.* 2 Hurlst. & N. 703; *Crouch v. Great Western R. Co.* 2 Hurlst. & N. 494, 3 Hurlst. & N. 183; *Webber v. Great Western R. Co.* 3 Hurlst. & C. 771; *Mytton v. Midland R. Co.* 4 Hurlst. & N. 615; *Coxon v. Great Western R. Co.* 5 Hurlst. & N. 274.

<sup>4</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325; *Hill Mfg. Co. v. Boston & L. R. Corp.* 104 Mass. 133, 6 Am. Rep. 202; *Buffett v. Troy & B. R. Co.* 40 N. Y. 172; *Susser R. Co. v. Morris & E. R. Co.* 19 N. J. Eq. 25; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80; *Munhall v. Pennsylvania R. Co.* 92 Pa. 150; *Eclipse Towboat Co. v. Pontchartrain R. Co.* 24 La. Ann. 1; *Jencks v. Coleman*, 2 Sumn. 221; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389; *Nutting v. Connecticut River R. Co.* 1 Gray, 502; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Harris v. Grand Trunk R. Co.* 15 R. I. 371; *Phillips v. North Carolina R. Co.* 78 N. C. 294; *Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co.* 70 Mo. 672, 35 Am. Rep. 444; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148; *McConnell v. Norfolk & W. R. Co.* 86 Va. 248; *Berg v. Atchison, T. & S. F. R. Co.* 30



There are decisions of some of the states which seem to hold, and are often cited as asserting the rule, that a railroad company which receives goods to carry, marked for particular destination, though beyond its own line, is *prima facie* bound to carry them to that place and deliver them there, and that an agreement of that nature is implied by the receipt of the goods thus marked.<sup>1</sup> Thus a stipulation relieving the carrier from responsibility of the goods, where they are "received for in good order" by the succeeding carrier, will not release the first carrier from its common law liability.<sup>2</sup> A carrier to whom freight is delivered for transportation over its own and other lines is liable for the negligence of a connecting carrier.<sup>3</sup> A carrier receiving freight charges to destination beyond its line, in absence of proof of its authority to contract for connecting carriers, is presumed to contract on its own account for the entire route.<sup>4</sup> And some courts which deny that the acceptance of goods marked beyond carrier's line implies a contract to deliver at their destination admit that a contract, to be

Kan. 561; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Crauford v. Southern R. Asso.* 51 Miss. 222, 24 Am. Rep. 626; *Knott v. Raleigh & G. Co.* 98 N. C. 73; *Morse v. Brainard*, 41 Vt. 550; *Jenneson v. Camden & A. R. & Transp. Co.* (Pa.) 4 Am. L. Reg. 234; *Skinner v. Hall*, 60 Me. 477; *Hadd v. United States & C. Exp. Co.* 52 Vt. 335, 36 Am. Rep. 757; *Hill v. Burlington, C. R. & N. R. Co.* 60 Iowa, 196; *Clyde v. Hubbard*, 88 Pa. 358; *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110; *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 176, 96 Am. Dec. 510; *Elmore v. Naugatuck R. Co.* 23 Conn. 457, 63 Am. Dec. 143; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609; *Condict v. Grand Trunk R. Co.* 54 N. Y. 502.

<sup>1</sup> *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Wilcox v. Parmelee*, 3 Sandf. 610; *Bunett v. Filsar*, 1 Fla. 403; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Illinois Cent. R. Co. v. Johnson*, 34 Ill. 389; *United States Exp. Co. v. Haines*, 67 Ill. 137; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Teall v. Sears*, 9 Barb. 317; *Angle v. Mississippi & M. R. Co.* 9 Iowa, 487; *Adams Exp. Co. v. Wilson*, 81 Ill. 337; *Mulligan v. Illinois Cent. R. Co.* 36 Iowa, 181; *East Tennessee & V. R. Co. v. Rogers*, 6 Heisk. 143; *Mosher v. Southern Exp. Co.* 38 Ga. 37; *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Fulvey v. Georgia R. Co.* 76 Ga. 597; *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245; *Wabash, St. L. & P. R. Co. v. Jaggerman*, 115 Ill. 407; *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *Noyes v. Rutland & B. R. Co.* 27 Vt. 110; *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 602; *Louisville & N. R. Co. v. Campbell*, 7 Heisk. 253; *Hansen v. Flint & P. M. R. Co.* 73 Wis. 346; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647; *Kyle v. Laurens R. Co.* 10 Rich. L. 382, 70 Am. Dec. 231.

<sup>2</sup> *Futman v. Cincinnati, H. & D. R. Co.* 2 Disney (Ohio) 248.

<sup>3</sup> *Ohio & M. R. Co. v. Hamlin*, 42 Ill. App. 441.

<sup>4</sup> *Condict v. Grand Trunk R. Co.* 4 Lans. 106.

liable beyond its own line, may be implied from circumstances, without express contract.<sup>1</sup>

But some of the cases cited as sustaining the English rule, rest in fact upon express statute. Thus the New York act of 1847, chapter 270, renders each railroad, which forms a link in a line of transportation which agrees to convey property beyond its own road, liable for the negligence of each of the other roads running in connection with it, over which the property shall subsequently pass on its way to its destination.<sup>2</sup> And a statute declaring that "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads, shall be liable as common carrier for the safe delivery of such freight at such place," imposes a liability only upon the company which originally receives the goods, where the delivery is to a carrier for transportation over its own line; the owner can recover for damages to the goods on the ground of negligence, upon proof of delivery to the first carrier, unless it can relieve itself by evidence of its freedom from negligence.<sup>3</sup> And it is held that the Missouri statute providing that the initial carrier by which a receipt or bill of lading is issued shall be liable for any loss of or damage to goods shipped, resulting from its own negligence or that of any other carrier to which the property is delivered, is constitutional.<sup>4</sup> And that this statute rendering a carrier receiving goods for carriage beyond its route liable for the negligence of a connecting carrier applies to a contract to carry goods from a point in the state to a point beyond it.<sup>5</sup> But in Texas it is ruled, that a provision limiting the liability of a railway company to its own line, in a bill of lading from a railway

<sup>1</sup> *Moser v. Brainard*, 41 Vt. 550; *Cutts v. Brainerd*, 42 Vt. 566, 1 Am. Rep. 353; *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Najac v. Boston & L. R. Co.* 7 Allen, 329, 83 Am. Dec. 686; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

<sup>2</sup> *Root v. Great Western R. Co.* 2 Lans. 199.

<sup>3</sup> *Smith v. New York Cent. R. Co.* 43 Barb. 225, 41 N. Y. 620.

<sup>4</sup> *Dimmitt v. Kansas City, St. J. & C. B. R. Co.* 103 Mo. 433; *Nines v. St. Louis, I. M. & S. R. Co.* 107 Mo. 475.

<sup>5</sup> *Watkins v. St. Louis, I. M. & S. R. Co.* 44 Mo. App. 245.

station in Texas to Galveston, in the same state, thence by steamer to Liverpool, purporting to be a foreign bill of lading and signed by one who signs as agent severally for the railway and the steamship companies, does not make it a domestic bill of lading so as to bring it within Tex. Rev. Stat. art. 278, forbidding carriers between points within the state from limiting their common law liability; and that a contract of a shipment of cotton from a station in the state of Texas on the line of a railroad to its terminus in the state of Louisiana is a foreign shipment, and not within Tex. Rev. Stat. art. 278, providing that railroad companies and other common carriers within the state shall not limit their liability at common law.<sup>1</sup>

In Georgia, while the English rule, from some rulings, seems to be favored, it is admitted that, at common law, in the absence of contract, the carrier's liability ends with his delivery to connecting carrier,<sup>2</sup> and a local statute is the foundation on which many of the decisions rest. Thus a declaration alleging that defendant was only one of connecting railroads of a continuous line and received from another railroad named, certain machinery easily injured by exposure, which it negligently transported in open cars, states a common law action, and is not sufficient to raise the question of defendant's liability, under the Georgia Code, § 2084, making the last of several railroads which received goods in good order, responsible for any damage, open or concealed, to the goods. A plaintiff relying on the provisions of this statute for recovery, should give notice by particular allegations in his declaration, as the liability under the proof, depends upon the statute.<sup>3</sup> A connecting carrier between whom and the initial carrier no privity or contractual relation is shown, the contract of shipment having been made with the initial carrier to transport the goods to their destination, is not liable on an implied contract to deliver the goods, for damages because of a delay in making delivery, whether such delay occurred on its own line or not, the remedy

<sup>1</sup> *Missouri Pac. R. Co. v. Sherwood*, 17 L. R. A. 643, 4 Inters. Com. Rep. 240, 84 Tex. 125.

<sup>2</sup> *Central R. & Bkg. Co. v. Skellie*, 86 Ga. 686.

<sup>3</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

of the shipper being against the initial carrier.<sup>1</sup> When goods are received by a carrier to be transported beyond the terminus of its line, and delivered at a particular place and to particular persons at such place or destination, without more, a contract is implied that the carrier will cause such goods to be carried to the place of destination safely, without damage or hurt; and it will be liable to the consignor for failure to perform its contract, for any damages which may arise therefrom to the party injured; and this rule is not changed by Ga. Code, § 2084, providing that each company shall be responsible only to its own terminus, and that the last company shall be responsible to the consignee, and that each shall settle among themselves the question of ultimate liability.<sup>2</sup>

A railroad company whose line extends from Atlanta to West Point, Georgia, having received at Atlanta goods for shipment, consigned to Dallas, Texas, and having fixed by contract with the consignor the rate of freight for the whole distance, apportioning a part of the same among the carriers, itself included, to New Orleans, and assessing the balance for the transportation beyond New Orleans, the contract was *prima facie* a through contract, and bound the initial company for performance to Dallas, the point of destination. This was so, notwithstanding the named rate was made subject to change without notice, the effect being to limit the agreed special rate to the particular shipments with reference to which the rate was established, but not to allow any change, either along or at the terminus of the route, which would affect these shipments.<sup>3</sup> A shipment of goods is taken out of the operation of Ga. Code, § 2084, regulating the liability of connecting railroads for the loss of and damage to goods, by the fact that the original shipment is by steamship, to be delivered to a connecting railroad; and the railroad is not liable unless the goods were received by it in good order.<sup>4</sup> A railroad company which

<sup>1</sup> *East Tennessee, V. & G. R. Co. v. Johnson*, 85 Ga. 497.

<sup>2</sup> *Overruling Baugh v. McDaniel*, 42 Ga. 642; *Fulvey v. Georgia R. Co.* 76 Ga. 597.

<sup>3</sup> *Atlanta & W. P. R. Co. v. Texas Grate Co.* 81 Ga. 602.

<sup>4</sup> *Joseph v. Georgia R. & Bkg. Co.* 88 Ga. 426.

receives fruit under a special through contract of shipment over other lines, without legal limitation of its liability, is liable for the negligence of its agents on another line in failing to deliver the goods within a reasonable time.<sup>1</sup>

Many of the other cases, moreover, in the state courts, which are cited as sustaining the English rule, are, in fact, decisions where an express liability beyond its own line was assumed by the carrier,—although the courts place the cases upon what they assume to be the doctrine announced in *Muschamp v. Lancaster & P. J. R. Co.* 8 M. & W. 421. And it is equally true that many of the cases in which the court has denied the liability,—unless agreed upon by express contract, were cases where such liability was excluded by express contract. In a case in one of the state courts, the English and American cases are reviewed at some length, and, it is said, that some of the decisions are based on the mistake of supposing that in the *Muschamp* case the defendants were held liable by the court as a matter of law. Some are controlled or influenced by the mistake of supposing that in *Muschamp's* case the opinion of the judges on the *prima facie* weight of the evidence were opinions on the law. It would seem—it is said in this review—that in no one of them has the question been held to be, or been treated as, a question of law, where it was claimed to be a question of fact, or where the attention of the court was called to the distinction between law and fact,—a distinction which has been clouded with misapprehension of *Muschamp's* case. In nearly all of the cases, where there is no decisive contract in writing, it is held to be, or practically treated to be, a question of fact. There is much in the American authorities going strongly to show, that Lord Abinger was right, and there is nothing in them having any considerable tendency to show that he was wrong, when he said in *Muschamp's* case: "The whole matter is therefore a question for the jury to determine what the contract was, on the evidence before them."<sup>2</sup> The question of the first carrier's liability beyond his own line, depends

<sup>1</sup> *Central R. & Bkg. Co. v. Georgia Fruit & V. Exch.* 91 Ga. 389; *Central R. & Bkg. Co. v. Hasselkus*, 91 Ga. 382.

<sup>2</sup> *Gray v. Jackson*, 51 N. H. 34, 12 Am. Rep. 1.

upon the inquiry whether he in any form assumed or held himself out to the public as assuming any responsibility beyond the terminus of his own route.<sup>1</sup>

The Supreme Court of the United States has held, however, that what constitutes a contract of carriage, is not a question of local law, upon which the decision of the state court must control. It is a matter of general law, upon which that court will exercise its own judgment.<sup>2</sup>

### § 96. *Carrier may Restrict Liability to its own Line.*

The condition where goods are received to be transported beyond the carrier's line, that the risk shall terminate on delivery, to the connecting line, is reasonable,<sup>3</sup> and there is no question among the authorities, of the power of the carrier by express contract, to limit its liability beyond its own line. This is the rule recognized by nearly all of the English and American courts.<sup>4</sup>

<sup>1</sup> *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679.

<sup>2</sup> *Chicago v. Robbins*, 67 U. S. 2 Black, 429, 17 L. ed. 304; *Brooklyn, C. & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612.

<sup>3</sup> *Aldridge v. Great Western R. Co.* 15 C. B. N. S. 582; *Field v. Chicago & R. I. R. Co.* 71 Ill. 458; *Harris v. Grand Trunk R. Co.* 15 R. I. 371; *Detroit & B. C. R. Co. v. McKenzie*, 43 Mich. 609; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376; *Tolman v. Abbot*, 78 Wis. 192; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *McConnell v. Norfolk & W. R. Co.* 86 Va. 248; *Merchants' Despatch & Transp. Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Hadd v. United States & C. Exp. Co.* 52 Vt. 335, 36 Am. Rep. 757.

<sup>4</sup> *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 27 L. ed. 325; *Pratt v. Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Tardos v. Chicago, St. L. & N. O. R. Co.* 35 La. Ann. 15; *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597; *East Tennessee, V. & G. R. Co. v. Brumley*, 5 Lea, 401; *Mulligan v. Illinois Cent. R. Co.* 36 Iowa, 186, 14 Am. Rep. 514; *Detroit & M. R. Co. v. Farmers & M. Bank*, 20 Wis. 124; *Pendergast v. Adams Exp. Co.* 101 Mass. 120; *Berg v. Atchison, T. & S. F. R. Co.* 30 Kan. 562; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Field v. Chicago & R. I. R. Co.* 71 Ill. 462; *American Exp. Co. v. Second Nat. Bank of Titusville*, 69 Pa. 394, 8 Am. Rep. 268; *Etna L. Ins. Co. v. Wheeler*, 49 N. Y. 616; *Snider v. Adams Exp. Co.* 63 Mo. 382; *Taylor v. Little Rock, M. R. & T. R. Co.* 32 Ark. 399, 29 Am. Rep. 1; *Central R. & Bkg. Co. v. Arant*, 80 Ga. 195; *Schiff v. New York Cent. & H. R. R. Co.* 52 How. Pr. 91; *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 424; *Illinois Cent. R. Co. v. Franken-*

Even the case of *Muschamp v. Lancaster & P. J. R. Co.* 8 Mees. & W. 421, does not assert a different rule. In England and in some of the states of the Union as shown in this last section, the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiction in which these diverse rulings are made there is a general concurrence of opinion in the proposition that the carrier may by special contract exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to destination. The ground of concurrence is contract, which in some jurisdictions it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination, while in the others it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries accruing after he has safely passed the freight to a connecting carrier.<sup>1</sup>

An initial carrier whose contract of transportation expressly limits its liability to its own road cannot be held liable for a delay in transportation on a connecting line, due to an unexpected and unprecedented snow blockade, and not contributed to by any negligence either on its part or that of the connecting carrier.<sup>2</sup> A carrier may by special contract limit to its own line its liability for negligence in the transportation and care of stock shipped, and where it does so it is not liable for injuries due to the negligence of another carrier.<sup>3</sup> A carrier which undertakes the shipment of stock for reduced through rates, and especially limits its liability for negligence to its own line, cannot be

*berg*, 54 Ill. 88, 5 Am. Rep. 92; *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *United States Exp. Co. v. Rush*, 24 Ind. 403; *Chicago & N. W. R. Co. v. Montfort*, 60 Ill. 175; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Aldridge v. Great Western R. Co.* 15 C. B. N. S. 582.

<sup>1</sup> See *ante*, § 95.

<sup>2</sup> *Palmer v. Atchison, T. & S. F. R. Co.* 101 Cal. 178.

<sup>3</sup> *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.) Feb. 7, 1894.

rendered liable for injuries occurring on a connecting line, on the ground that the shipper did not want his stock shipped over that route, as in such case the initial carrier has the right, in the absence of any contrary stipulation, to choose its connecting lines.<sup>1</sup>

A delivered to the United States Express Co. a package of money to be transported to a place not on the route of that company. The package was transported by the company to a point on the line nearest the place of destination, and there delivered as was customary, to the proprietors of a line of stages, known as "Winslow's Express," to be carried to its destination. The receipt given by the United States Express Co. stipulated that the company undertook to forward the package to the point nearest its destination reached by that company, and that the company should be held liable as forwarders only. The package was lost while in the custody of Winslow's Express. An action was brought by the consignees against the United States Express Co. to recover the value of the package. It was ruled that the United States Express Co. was only bound to transport the package safely to the point on its line nearest to the place of destination and there deliver it to a proper carrier to be forwarded to its destination, and having done this, that company was not responsible for the subsequent loss.<sup>2</sup> It is perfectly competent for several distinct and independent companies to limit their liability by contract as expressed in the bill of lading, for the transportation of goods over their line.<sup>3</sup>

Carriers making a through contract for the shipment of merchandise, whether through an initial line agreeing to ship beyond its own road or through a transportation company having no line of its own, but simply authorized to ship over connecting lines, may insert therein a fire exemption clause, although no offer is made to assume the risk for additional compensation, since there is no common law liability to make the through shipment,<sup>4</sup> and certainly a bill of lading containing a clause in which it is mutu-

<sup>1</sup> *Galveston, H. & S. A. R. Co. v. Short* (Tex. Civ. App.) Feb. 7, 1894.

<sup>2</sup> *United States Exp. Co. v. Rush*, 24 Ind. 403.

<sup>3</sup> *Schiff v. New York Cent. & H. R. R. Co.* 52 How. Pr. 91.

<sup>4</sup> *Deming v. Merchants Cotton-Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306.



ally agreed, in consideration of special rates, that the liability of each carrier shall be limited to loss or injury to the goods occurring on his own line, is a legitimate limitation of the carrier's liability, and becomes a part of the contract binding on the shipper, although he could not read and did not know that the limiting clause was in the bill.<sup>1</sup> A stipulation in a shipping contract, restricting the right to recover against the carrier for damages done to the property shipped, to the company in whose hands it is when damaged, is a reasonable one.<sup>2</sup>

A carrier giving a shipping receipt limiting to its own line its liability for loss of or damage to freight received by it, is not liable for an injury occurring to freight in the possession of a connecting carrier; and its liability is not increased by the fact that the freight was delivered at the terminus of its line to be taken by the connecting carrier to its destination.<sup>3</sup> A carrier is not liable for damages to perishable freight, under a written contract by the terms of which it is expressly provided that it shall not be responsible beyond its own line, due to delays occurring on other roads, where it is not guilty of any negligence while the freight is in its possession.<sup>4</sup>

Under Mo. Rev. Stat. 1889, § 944, a railway carrier receiving goods to be shipped over its own and connecting lines to the point of destination may stipulate in the contract of shipment against damages to the goods occasioned by the negligence of the connecting carrier.<sup>5</sup> A railway company receiving goods for transportation may limit its liability by specific agreement that it is to be liable only for loss or damage occurring on its own line and not for such as may occur on a connecting line.<sup>6</sup>

An initial carrier may protect itself by contract against liability for loss not occurring on its own line, whether the shipment be wholly

<sup>1</sup> *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376, 45 Am. & Eng. R. Cas. 321; *Western R. Co. v. Hurwell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 353.

<sup>2</sup> *New York & T. S. S. v. Wright* (Tex. Civ. App.) March 7, 1894.

<sup>3</sup> *Tolman v. Abbot*, 78 Wis. 192.

<sup>4</sup> *Atchison, T. & S. F. R. Co. v. Richardson*, 53 Kan. 157.

<sup>5</sup> *Hill v. Missouri Pac. R. Co.* 46 Mo. App. 517.

<sup>6</sup> *Nines v. St. Louis, I. M. & S. R. Co.* 107 Mo. 475.

within one state or be interstate,<sup>1</sup> even where the statute imposes the liability.<sup>2</sup> A railroad operated partly in Texas and partly in another state may limit its liability for carrying cotton into another state, notwithstanding Tex. Rev. Stat. art. 278, which forbids carriers entirely within the state to limit their liability at common law.<sup>3</sup> In Texas, a carrier may by contract limit its liability to loss or damage occurring on its own line of road and provide that it shall not be liable for any loss occurring on a connecting line;<sup>4</sup> and in states where the liability imposed on the first carrier may be relieved by a written receipt from the next carrier, an instrument is effective, although not in technical form.<sup>5</sup>

### § 97. *May Contract for Freight and Transportation beyond its own Line.*

The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What these limitations are, it is only possible in a general way to define. The New York Central & Hudson River Railroad Company could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York in order that it might secure the business of transporting such passengers over its route to Buffalo; but it might run ferryboats from Staten Island, or from the New Jersey shore for the purpose of securing passengers or freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for

<sup>1</sup> *McCarn v. International & G. N. R. Co.* 16 L. R. A. 39, 84 Tex. 352; *Hill v. Missouri Pac. R. Co.* 46 Mo. App. 517; *F. A. Drew Glass Co. v. Ohio & M. R. Co.* 44 Mo. App. 416; *Historical Pub. Co. v. Adams Exp. Co.* 44 Mo. App. 421; *Nines v. St. Louis, I. M. & S. R. Co.* 107 Mo. 475; *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256; *Fl. Worth & D. C. R. Co. v. Williams*, 77 Tex. 121; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Texas & P. R. Co. v. Adams*, 78 Tex. 372; *Harris v. Howe*, 5 L. R. A. 777, 73 Tex. 537.

<sup>2</sup> *Dimmitt v. Kansas City, St. J. & C. B. R. Co.* 103 Mo. 433.

<sup>3</sup> *Missouri Pac. R. Co. v. International M. Ins. Co.* 84 Tex. 149.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Clarke* 5 Tex. Civ. App. 547; *Texas & P. R. Co. v. Smith* (Tex. Civ. App.) Dec. 13, 1893.

<sup>5</sup> *Miller v. South Carolina R. Co.* 9 L. R. A. 833, 33 S. C. 359.

transportation over its route, by a corporate carrier, must be exercised within reasonable limits, and under such circumstances that it may fairly be said to be incident to its legitimate corporate powers.<sup>1</sup> Where this is the case, the power of a carrier, whether incorporated or not, to render itself liable for the safe delivery of goods beyond its own line, has been almost universally recognized,—both in this country—except in Connecticut,<sup>2</sup> and in England. Such a contract is not *ultra vires*.<sup>3</sup>

An initial carrier which undertakes the shipment of livestock for a reduced through rate thereby binds itself to protect such other rate, and is liable for any charge above the agreed rate, made for transportation over its own or connecting lines.<sup>4</sup> A railway company may, by contract, assume to carry goods beyond its line, and it will be then responsible as a common carrier for the entire route,<sup>5</sup> and liable for the acts and negligence of other carriers not under its control.<sup>6</sup> A contract by the receiver of a railroad company for the carriage of freight and passengers beyond the limits of the road immediately under its control is valid.<sup>7</sup> A carrier which undertakes to transport freight beyond its own route is liable in New York for the consequences of any want of reasonable diligence at any part of the route, in the absence of any limitation of liability in the contract of affreightment.<sup>8</sup> It ensures the delivery thereof to the consignee, and is liable to him for any loss or injury occurring during transportation, except such as results from the act of God or a public

<sup>1</sup> *Swift v. Pacific Mail S.S. Co.* 106 N. Y. 206.

<sup>2</sup> *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166.

<sup>3</sup> *Féital v. Middletown R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *Bissell v. Michigan, S. & N. I. R. Co.* 22 N. Y. 258; *Swift v. Pacific Mail S.S. Co.* *supra*; *Noyes v. Rutland & B. R. Co.* 27 Vt. 110; *Weed v. Saratoga & S. R. R. Co.* 19 Wend. 534 (See Editorial Note & Citation Lawyer Edition); *Western & A. R. Co. v. McEluee*, 6 Heisk. 219; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77; *Perkins v. Portland, S. & P. R. Co.* 47 Me. 573, 74 Am. Dec. 507; *Wilby v. West Cornwall R. Co.* 2 Hurlst. & N. 703; *Wylde v. Northern R. Co. of N. J.* 53 N. Y. 156; *Root v. Great Western R. Co.* 45 N. Y. 524; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500.

<sup>4</sup> *Galveston, H. S. & A. R. Co. v. Short* (Tex. Civ. App.) Feb. 7, 1894.

<sup>5</sup> *Hill Mfg. Co. v. Boston & L. R. R. Corp.* 104 Mass. 122, 6 Am. Rep. 292.

<sup>6</sup> *Noyes v. Rutland & B. R. Co.* 27 Vt. 110.

<sup>7</sup> *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348.

<sup>8</sup> *Jennings v. Grand Trunk R. Co.* 127 N. Y. 438, 49 Am. & Eng. R. Cas. 93.

enemy or the sole fault of the owner or his agent, including a loss resulting from the combined fault of the carrier and such owner.<sup>1</sup>

Where liability has once attached under a contract for the shipment of goods over its own line and connecting lines, it cannot be released by notice, or even a contract limiting its liability for negligence of any connecting line.<sup>2</sup> Nor can a carrier expressly contracting to deliver goods at a certain point, release itself from liability by proof of delivery to another carrier to complete such transportation.<sup>3</sup>

### § 98. *Must Deliver Goods to Connecting Carrier.*

One whose route, not being the first one, lies somewhere between the point of shipment and the point of destination, along the usual route of travel, is the connecting carrier. It becomes such under the contract—express or implied—by which the shipper places in the hands of the carrier goods destined for delivery beyond the initial carrier's line,—and to a point along the line of the route occupied by such intermediate carrier. And the contract to deliver, by the initial carrier, to a point of destination, makes such connecting carrier the agent of the initial carrier for continuing the transportation. Or, if the initial carrier has only undertaken to transport the goods to the end of its own line and thence forward, by the connecting carrier,—the contract makes such connecting carrier the agent of the shipper for transporting them along his route.<sup>4</sup> Under this definition, a "Transfer Company" or "Trucking Company" is not a connecting carrier where it receives the goods after the point of destination has been reached. It is said, that "there can be no connecting carrier who does not, as such, receive the goods from the last preceding carrier, acting under and by virtue of the original contract for through transportation." Under such circumstances, where the

<sup>1</sup> *McCarthy v. Louisville & N. R. Co.* (Ala.) Dec. 22, 1893.

<sup>2</sup> *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391.

<sup>3</sup> *Kyle v. Laurens R. Co.* 10 Rich. L. 382; *Little v. Semple*, 8 Mo. 99, 40 Am. Dec. 133.

<sup>4</sup> *Nanson v. Jacob*, 12 Mo. App. 125.

delivery is required, not at the depot of the carrier, but at a special designation in the place, the transportation company is only the means employed by the carrier thus to perfect its delivery.<sup>1</sup> Where the consignee has been notified to get his goods, the transfer company employed by him to remove them is not a connecting carrier.<sup>2</sup>

A carrier is not relieved from liability as an insurer by simply unloading goods at the end of his line and storing them in a warehouse without delivery or attempting to deliver to next carrier.<sup>3</sup> Reasonable diligence must be used to deliver or tender goods to the succeeding carrier.<sup>4</sup> Goods marked to a destination requiring their passage over the lines of several connecting carriers, impose a duty on each carrier to transport the goods safely over its own route and deliver them to the connecting carrier.<sup>5</sup> While, in the absence of a special contract, a railroad company is not bound to carry goods beyond its terminus,—yet, if they are directed to a point beyond its line, it is required to deliver them to the proper custody to insure their transportation.<sup>6</sup>

In the absence of any contract by an initial carrier to deliver perishable goods at their destination, the carrier's common law liability is to deliver the goods in good order to the connecting carrier within a reasonable time; and it is not liable for any subsequent delay in forwarding the goods, by reason of which they were delivered in a damaged condition.<sup>7</sup> The refusal of a car-

<sup>1</sup> *Nanson v. Jacob*, 12 Mo. App. 125; *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522.

<sup>2</sup> *Nanson v. Jacob*, 93 Mo. 331.

<sup>3</sup> *Etna Ins. Co. v. Wheeler*, 5 Lans. 480, affirmed in 49 N. Y. 616; *Dunson v. New York Cent. R. Co.* 3 Lans. 265; *Irish v. Milwaukee & St. P. R. Co.* 19 Minn. 376, 18 Am. Rep. 340; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297.

<sup>4</sup> *Burroughs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Dunham v. Boston & M. R. Co.* 70 Me. 164, 35 Am. Rep. 314; *Regan v. Grand Trunk R. Co.* 61 N. H. 379.

<sup>5</sup> *McDonald v. Western R. Corp.* 34 N. Y. 497.

<sup>6</sup> *Rome R. Co. v. Sullivan*, 25 Ga. 228.

<sup>7</sup> *Central R. & Bkg. Co. v. Skellie, Rickerson*, 86 Ga. 686; *Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110; *Nutting v. Connecticut River R. Co.* 1 Gray, 502; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. 341, 35 Am. Rep. 705; *McConnell v. Norfolk & W. R. Co.* 86 Va. 248; *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14.

rier, after payment of freight and offer of customary switching charges, to switch cars to a connecting line for delivery at the coal yard of the consignee, whose financial responsibility is not questioned, unless he promises in advance to pay any demurrage charges that may be made, regardless of their unreasonableness, will render the carrier liable for damages to him, although he had previously refused to pay such charges on other cars.<sup>1</sup> So long as a carrier holds the goods in his vehicles of transportation, awaiting the pleasure, convenience, or necessities of the succeeding carrier, his liability as carrier continues.<sup>2</sup> A railroad company is not excused from delivery to a connecting carrier by a clause in its charter that the company shall be responsible for goods on deposit at its depot awaiting delivery, as warehousemen and not as common carriers.<sup>3</sup>

Where a freight car is itself transported over connecting lines, the liability of each connecting road does not commence until the car is transferred to it, and the first carrier is liable to the shipper until it shows such delivery.<sup>4</sup> A carrier which checks a passenger's baggage to a station upon a connecting railroad is liable for its destruction in a union depot used by both, before it has delivered the baggage to the other carrier.<sup>5</sup> The duty of a carrier receiving goods to be transported beyond its route, is not terminated by storing the goods in its warehouse at the end of the route, unless there be a custom or special agreement to that effect.<sup>6</sup> It is competent to introduce evidence of the course of business followed by connecting carriers, on a question of the delivery or receipt of goods between them.<sup>7</sup>

Where no special directions accompany the shipment, whose destination is indicated only by the marks thereon,—the carrier may assume that the shipper intends that they shall be trans-

<sup>1</sup> *Macloon v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>2</sup> *Bennitt v. Missouri P. R. Co.* 46 Mo. App. 656.

<sup>3</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 330, 21 L. ed. 297, 303.

<sup>4</sup> *Rome R. Co. v. Sloan*, 39 Ga. 636.

<sup>5</sup> *Hyman v. Central Vermont R. Co.* 66 Hun, 202.

<sup>6</sup> *Irish v. Milwaukee & St. P. R. Co.* 19 Minn. 376, 18 Am. Rep. 349.

<sup>7</sup> *Root v. Great Western R. Co.* 65 Barb. 619.

ported in the usual and customary manner. Thus, if the usual practice is to deliver goods marked to a certain point, to a connecting carrier by canal, or by steamer, or by stage, the carrier will have discharged his duty when he has made such delivery, in accordance with such custom to thus forward;<sup>1</sup> and even a duty implied by law under ordinary circumstances, may be controlled by a uniform usage and course of business among carriers.<sup>2</sup> But, in this, as in all other matters of business, the custom, in order to have controlling force, must be general, uniform and well established;—and when the custom is thus proved it will be conclusively assumed to be known to the shipper, and will be binding upon him.<sup>3</sup>

A custom is something which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject-matter to which it relates, and is ordinarily taken notice of without proof.<sup>4</sup> The chief office of custom is to illustrate the intention of contracting parties in reference to matters on which the contract is not explicit, and thereby terms not inconsistent with a contract may be held to be a part of it; but when the contract is clear and explicit, custom cannot change it.<sup>5</sup> Parties who are engaged in a particular trade or business, or persons accustomed to deal with those engaged in a particular business, may be presumed to have knowledge of the uniform course of such business. Its usages may therefore, in the absence of any agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business, or ordinary incidents thereto.<sup>6</sup> In such a case it is competent to show what the

<sup>1</sup> *Van Santvoord v. St. John*, 6 Hill, 160.

<sup>2</sup> *Rawson v. Holland*, 59 N. Y. 618, 18 Am. Rep. 394.

<sup>3</sup> *Ante*, §§ 33, 74.

<sup>4</sup> *Morningstar v. Cunningham*, 110 Ind. 328.

<sup>5</sup> *Harrell v. Zimpleman*, 66 Tex. 292; *Smith v. Clews*, 4 L. R. A. 392, 114 N. Y. 190.

<sup>6</sup> *East Tennessee V. & G. R. Co. v. Johnston*, 75 Ala. 596, 51 Am. Rep. 489; *Mooney v. Howard Ins. Co.* 138 Mass. 375, 52 Am. Rep. 277; *Florence Mch. Co. v. Daggett*, 135 Mass. 582; *Fitzimmons v. Academy of Christian Brothers*, 81 Mo. 37; *Cooper v. Kane*, 19 Wend. 386, 32 Am. Dec. 512; *Kelton v. Taylor*, 11 Lea, 264, 47 Am. Rep. 284; *Morningstar v. Cunningham*, 110 Ind. 328.

known and ordinary usage of a particular business is, with a view of raising a presumption that the transaction in question was according to the ordinary course of the business to which it related.<sup>1</sup> Sometimes, if the custom be legal, knowledge of its existence must be brought home to the shipper.<sup>2</sup>

While goods are passing over successive links of a connecting line,—although they may be temporarily deposited in depots or warehouses along the route,—they are considered in transit, until their final destination is reached; and the carrier in whose possession they are when destroyed or injured is liable.<sup>3</sup> The plaintiff was the owner of a line of steamers, employed in the transportation of goods between Baltimore and Richmond. Its steamers were accustomed to stop at City Point, for the purpose of landing goods to be sent to Petersburg. The defendant, a railroad company, was engaged in the transportation of goods over its railroad, from City Point to Petersburg. A contract existed between the parties, whereby goods and merchandise destined for transportation to Petersburg were to be received by the plaintiffs in Baltimore, carried in steamers to City Point, and there delivered to the defendant to be by it transported over its railroad to the place of destination. One of the steamboats of the plaintiffs left Baltimore every Saturday afternoon, arrived at City Point on Sunday, and there, such of its cargo as was destined for Petersburg, was landed and deposited in the warehouse of the defendants, and remained in the warehouse until the following day. After the goods in question had been so deposited and on the same day the warehouse and all the goods were destroyed by fire. Suit was brought against the plaintiff by the shipper of the goods, and judgment was recovered against it. All labor, “at any trade or calling on a Sabbath day, except in a

<sup>1</sup> *Reissner v. Ozley*, 80 Ind. 580; *Loneragan v. Stewart*, 55 Ill. 44; *Lyon v.*

<sup>2</sup> *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 299; *Dunham v. Boston & M. R. Co.* 70 Me. 164, 35 Am. Rep. 314.

<sup>3</sup> *Conkey v. Milwaukee & St. P. R. Co.* 31 Wis. 619, 11 Am. Rep. 630; overruling, on this question, *Wood v. Milwaukee & St. P. R. Co.* 27 Wis. 541, 9 Am. Rep. 465.



household, or other work of necessity or charity," is prohibited in Virginia by the 16th section of the Code. In this case the plaintiff made the contract with the shippers in its own name, collected the entire freight money, and paid over to defendant such portion of it as belonged to them under the arrangement.

It is said that to take care of the goods on a "Sabbath day," and safely and securely keep them, after the goods were received was a work of necessity, and, therefore, was not unlawful, and there is no authority in any court to declare the goods forfeited even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse on Sundays, were within the prohibition of the statute. Subsequent custody of the goods was not within that prohibition; and the law imposed the obligation upon the defendant to keep the goods safely until the following morning, and to transport them over the railroad to the place of destination and deliver them to the consignees. A subsequent custody of the goods was not unlawful; the obligation of the defendant, under the circumstances of this case, was not varied by the fact that the goods were deposited in its warehouse by its consent on the "Sabbath day."<sup>1</sup>

Storage of goods passing over connecting lines, by one of the intervening carriers in its depot, will not be treated as warehousing the goods. This doctrine does not apply where goods are consigned to a point beyond the line of the road storing them.<sup>2</sup> There must be a delivery to the next carrier; and relation of warehouseman cannot be assumed while the goods remain in the depot.<sup>3</sup> The carrier, forming a link in the transportation, while holding goods for delivery to the connecting carrier, is the agent of the owner,<sup>4</sup> and is authorized to treat the connecting carrier as the consignee's agent to receive the delivery; and its liability continues until the goods are ready for delivery to such agent.

<sup>1</sup> *Powhatan S. B. Co. v. Appomattox R. Co.* 65 U. S. 24 How. 247, 16 L. ed. 682.

<sup>2</sup> *Hooper v. Chicago & N. W. R. Co.* 27 Wis. 81, 9 Am. Rep. 434.

<sup>3</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed, 297.

<sup>4</sup> *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

and a reasonable time has passed for the removal of the goods.<sup>1</sup> The placing of a car by the initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions, does not establish the relation of common carrier between the shipper and the connecting carrier.

A carrier has no right to assume, in discharge of his obligation, that an offer to deliver to the connecting carrier would have been met with a refusal to receive.<sup>2</sup> If the goods are stored by the carrier, without a reasonable, diligent attempt to secure their forwarding in accordance with the instructions given to the carrier on their shipment, it will be liable.<sup>3</sup> Where notice of the arrival of goods is placed by custom, in a special depository, to which the next carrier has access, this is a sufficient notice of the arrival; but if the goods are not removed within a reasonable time, there should be a storage thereof or an act equivalent to the legal termination of the relation of carrier.<sup>4</sup> A railroad company is not liable for the loss by fire of a car received by it from another company, while it is standing on its side track at its destination to be unloaded by the consignee, although by its contract it is to transport it to its yard when unloaded.<sup>5</sup> If connecting line will not receive them, carrier may, after a reasonable time, store them, and then be liable only as a warehouseman.<sup>6</sup> If the goods cannot be shipped, they must be carefully

<sup>1</sup> *Wood v. Milwaukee & St. P. R. Co.* 27 Wis. 541, 9 Am. Rep. 465.

<sup>2</sup> *Mt. Vernon Co. v. Alabama G. S. R. Co.* 92 Ala. 296.

<sup>3</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 33 U. S. 16 Wall. 318, 21 L. ed. 297.

<sup>4</sup> *Gass v. New York, P. & B. R. Co.* 99 Mass. 220, 96 Am. Dec. 742; *Merchants Despatch Transp. Co. v. Kaln.* 76 Ill. 520; *Ayers v. Western R. Corp.* 14 Blatchf. 9; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Louisville & N. R. Co. v. Campbell*, 7 Heisk. 253; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *Brintnall v. Saratoga & W. R. Co.* 32 Vt. 665; *Irish v. Milwaukee & St. P. R. Co.* 19 Minn. 376, 18 Am. Rep. 340.

<sup>5</sup> *Mills v. Michigan Cent. R. Co.* 45 N. Y. 622, 6 Am. Rep. 152; *Angle v. Mississippi & M. R. Co.* 9 Iowa. 487.

<sup>6</sup> *Peoria & P. U. R. Co. v. United States Rolling Stock Co.* 136 Ill. 643.

<sup>7</sup> *Nutting v. Connecticut River R. Co.* 1 Gray, 502; *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394.

stored.<sup>1</sup> Otherwise the carrier will be liable for a conversion of the goods.<sup>2</sup>

Upon the refusal of the connecting carrier—to whom the carrier is instructed to transfer the goods—to accept them, the consignor or consignee should be notified and reasonable care should be taken to protect the goods.<sup>3</sup> Where the goods are declined for any reason by the carrier to whom they are tendered, the original carrier must use due diligence in shipping them by the best available remaining method; and he will be relieved from responsibility for any loss that may result after such effort.<sup>4</sup> A carrier may require prepayment of freight charges from any shipper, at its choice, and may lawfully refuse to receive freight from a receiving carrier without such prepayment, although it does not require it from others; but notice of such requirement should be given to the shipper or receiving carrier.<sup>5</sup>

A reasonable time within which the connecting carrier must accept goods ready for delivery to him by the preceding carrier, is the earliest practicable time after the first carrier gives notice of its readiness to deliver, and is not affected by circumstances rendering it embarrassing for the second carrier to accept them with promptness. The question is one for the jury, controlled, of course, by this rule of law.<sup>6</sup>

It is the carrier's duty to inform the shipper of any unavoidable circumstances existing at the termination of his own route,

<sup>1</sup> *Lesinsky v. Great Western Dispatch*, 10 Mo. App. 134; *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Condon v. Marquette & O. R. Co.* 55 Mich. 218, 54 Am. Rep. 367.

<sup>2</sup> *Georgia R. Co. v. Cole*, 68 Ga. 623.

<sup>3</sup> *Petersen v. Case*, 21 Fed. Rep. 885; *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398; *Lesinsky v. Great Western Dispatch Co. supra*; *Strong v. A Certain Quantity of Wheat*, 70 U. S. 3 Wall. 225, 18 L. ed. 194; *Louisville & N. R. Co. v. Campbell*, 7 Heisk. 253.

<sup>4</sup> *Hornthal v. Roanoke, N. & B. S. B. Co.* 107 N. C. 76; *Regan v. Grand Trunk R. Co.* 61 N. H. 579; *Peck v. Weeks*, 34 Conn. 145; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Nashville & O. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Cuss v. Boston & L. R. Co.* 14 Allen, 448; *Empire Transp. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178; *American Exp. Co. v. Smith*, 33 Ohio St. 511, 31 Am. Rep. 561.

<sup>5</sup> *Randall v. Richmond & D. R. Co.* 11 L. R. A. 460, 107 N. C. 748.

<sup>6</sup> *Wood v. Milwaukee & St. P. R. Co.* 27 Wis. 541, 9 Am. Rep. 465.

in the way of a prompt delivery to the carrier next in line.<sup>1</sup> And it is liable for detention of goods addressed to a specified place "via" another, at the latter, without using reasonably available means to forward them to their destination or notifying the consignee, notwithstanding any custom of its own not communicated to the shipper or consignee.<sup>2</sup> No custom, however, will be recognized which is in direct conflict with the settled legal rights of the parties, thus: A custom is illegal which requires a shipper to agree as a condition of shipment, that his measure of damages should not be more than the cash value of the stock shipped at the place of shipment.<sup>3</sup> But a carrier's failure to notify a shipper of the liability of storms on a connecting line is not such negligence, as matter of law, as would render it liable for a delay in transportation caused by an unusual and unexpected blockade, but should be submitted to the jury to determine whether the company was in fact negligent.<sup>4</sup>

The common law obligations of a railroad company to a connecting line are the same as to reception, transportation and delivery of freight as those existing between a railroad company and an individual shipper. The receiving carrier has no more right to require the delivering carrier to stop its cars at the junction of the two roads than an individual would have to require to stop at the point nearest his residence.<sup>5</sup> While a constructive delivery, by deposit at a place agreed upon by connecting carriers, may be sufficient as between the carriers, to cast the loss upon the carrier in default, such custom will not affect the shipper, who retains his recourse upon the carrier who, while making a constructive delivery, has not actually transferred the property to the connecting carrier.<sup>6</sup> A railway company does not, by giving its

<sup>1</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 313, 21 L. ed. 297.

<sup>2</sup> *Denver & R. G. R. Co. v. De Witt*, 11 Colo. App. 419.

<sup>3</sup> *Missouri Pac. R. Co. v. Fugan*, 2 L. R. A. 75, 72 Tex. 127.

<sup>4</sup> *Palmer v. Atchison, T. & S. F. R. Co.* 101 Cal. 178.

<sup>5</sup> *Shelbyville R. Co. v. Louisville, C. & L. R. Co.* 82 Ky. 541.

<sup>6</sup> *Conkey v. Milwaukee & St. P. R. Co.* 31 Wis. 619, 11 Am. Rep. 630; *McDonald v. Western R. Corp.* 34 N. Y. 497; *Condon v. Marquette, H. & O. R. Co.* 55 Mich. 218, 54 Am. Rep. 367; *Meriam v. Hartford & N. H. R. Co.* 20 Conn.

bills of lading for cotton in the sheds of another company, take possession of the cotton, and does not make the other company its agent to hold the cotton.<sup>1</sup>

Where, by agreement between the first carrier and connecting carrier, neither considered the goods as delivered from one to the other unless the freight was paid or the waybill endorsed "freight charges guaranteed," the first carrier cannot, by placing the car of goods on the track used in common by them, and notifying the connecting carrier, but without guaranteeing the latter's freight charges, relieve itself from liability for goods damaged by fire in a depot of the connecting carrier.<sup>2</sup> The placing of a car by an initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions, does not establish the relation of contractors between the initial and the connecting carrier.<sup>3</sup>

Where the road on which goods were shipped, delivered the goods to a connecting road with a transfer bill, damages cannot be claimed against the first road for the wrongful delivery by the connecting road to the consignee, without requiring the presentation of the bill of lading.<sup>4</sup> And where parties are in joint possession of premises, and a particular place within those premises is designated at which one carrier shall deposit goods transported over his line, and which are to be carried by the connecting carrier in joint possession of the premises, such deposit will be treated as an actual delivery.<sup>5</sup> The general rule is that a carrier of goods destined beyond his line, is—as to the succeeding carrier—the owner, and he has power to contract with such succeeding carrier on behalf of the owner,

362, 52 Am. Dec. 344; *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 518; *Goold v. Chapin*, 20 N. Y. 259, 75 Am. Dec. 398; *Fenner v. Buffalo & S. L. R. Co.* 46 Barb. 103; *Etna Ins. Co. v. Wheeler*, 49 N. Y. 161.

<sup>1</sup> *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

<sup>2</sup> *Pulmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137.

<sup>3</sup> *Mt. Vernon Co. v. Alabama G. S. R. Co.* 92 Ala. 295.

<sup>4</sup> *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 67 Mich. 110.

<sup>5</sup> *Pratt v. Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336; *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166.

and release and limit the liability of the latter the same as the owner could do; and it is his duty—unless his authority is expressly limited—to enter into such contract, and forward the goods, rather than retain them and await instructions.<sup>1</sup> This authority of the original carrier, however, it has been held, cannot make the owner responsible for the negligence of a connecting road.<sup>2</sup> In a delivery of the goods to the succeeding carrier, care must be taken to accompany such delivery with full and accurate information as to the instructions under which the goods were shipped. And on failure to communicate such instructions, and the consequent loss of the goods, the original carrier will be liable.<sup>3</sup>

A bill of lading is the written contract of the parties and by its terms their rights and liabilities must be measured,<sup>4</sup> and the carrier undertaking to forward the goods to the destination indicated by the marks is liable for loss where it delivers the goods to a connecting line without the instructions contained in their bill.<sup>5</sup> A condition on the back of a through bill of lading, relieving a railway company from responsibility as soon as the goods have been delivered to the next succeeding carrier, is legal and reasonable, and is binding on the shipper, who either has, or from the circumstances is presumed to have, knowledge thereof, and to have accepted the contract subject to such condition.<sup>6</sup>

The shipper who accepts a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, in legal contemplation, authorizes the initial carrier to select any rea-

<sup>1</sup> *Squire v. New York Cent. & H. R. R. Co.* 98 Mass. 240, 93 Am. Dec. 162; *Ratson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 113, 18 L. ed. 172; *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51, 40 Am. Rep. 453.

<sup>2</sup> *Sherman v. Hudson River R. Co.* 64 N. Y. 254; *Dunham v. Boston & M. R. Co.* 70 Me. 164, 35 Am. Rep. 314.

<sup>3</sup> *North v. Merchants & M. Transp. Co.* 146 Mass. 315; *Little Miami R. Co. v. Washburn*, 22 Ohio St. 324.

<sup>4</sup> *Fry v. Louisville, N. A. & C. R. Co.* 103 Ind. 265.

<sup>5</sup> *North v. Merchants & M. Transp. Co.* *supra*.

<sup>6</sup> *Baumont v. Canadian Pac. R. Co.* 5 Mont. L. Rep. (Super. Ct.) 255; *Grand Trunk R. Co. v. McMillan*, 16 Can. S. C. 543, 42 Am. & Eng. R. Cas. 468; *Central R. & Bkg. Co. v. Avant*, 80 Ga. 195; *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245; *Bethea v. Northeastern R. Co.* 26 S. C. 91.

sonable or usual direct and safe route by which to forward after the goods reach the end of his line,—unless the particular line by which the goods consigned are to be forwarded, is designated in the bill of lading. If the bill be silent in respect to the line by which the goods are to be forwarded, parol evidence will not be permitted to show that a special line was agreed upon.<sup>1</sup>

If a shipper gives no directions as to the particular route by which the freight is to be sent forward, it is the duty of the freight agent to forward it by the best and cheapest route for the shipper. But where a shipper directs the initial carrier as to the route by which the freight shall be shipped to destination, the freight agent should make proper notations on the waybill to accomplish the purpose.<sup>2</sup> At common law, a carrier is not bound to carry except on his own line, and if he contracts to go beyond, he may confine himself in carrying, to the particular route he chooses to use and may select his own agencies.<sup>3</sup> While it is the duty of a state carrier which engages in interstate commerce to forward traffic offered from a connecting line, there is no authority, in the Interstate Commerce Act, to compel the carrier to forward the traffic over a route not operated or selected by itself.<sup>4</sup>

Generally, where there is a choice among connecting carriers, the directions of the shipper must be followed.<sup>5</sup> A carrier is not justified in making a delivery of a shipment, except in accordance with the bill of lading.<sup>6</sup> Where the first carrier delivered the goods to a railroad other than that named in the agreement, and they were burned while in possession of such second carrier, the first carrier is liable for the loss,<sup>7</sup> and where there is an express con-

<sup>1</sup> *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422; *Cumden & A. R. Co. v. Forsyth*, 61 Pa. 81; *White v. Ashton*, 51 N. Y. 280; *Hinckley v. New York Cent. & H. R. R. Co.* 56 N. Y. 429; *Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518; *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

<sup>2</sup> *Punky v. Richmond & D. R. Co.* 3 Inters. Com. Rep. 33.

<sup>3</sup> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291.

<sup>4</sup> *Mattingly v. Pennsylvania Co.* 2 Inters. Com. Rep. 806.

<sup>5</sup> *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394.

<sup>6</sup> *Pennsylvania R. Co. v. Stern*, 119 Pa. 24.

<sup>7</sup> *Independence Mills Co. v. Burlington, C. R. & N. R. Co.* 72 Iowa, 535. See also *Pulmer v. Chicago, B. & Q. R. Co.* 56 Conn. 137; *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590.

tract to deliver to the order of the plaintiff at the end of defendant's route, a contract to forward by a connecting carrier beyond the terminus of its route cannot be implied.<sup>1</sup> If possession of goods be given for a specific purpose, as to a carrier or wharfinger, the property is not changed by the sale of such a bailee, and the owner may recover them even from the bona fide buyer.<sup>2</sup> An agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power.<sup>3</sup> A carrier which has received merchandise under a bill of lading providing for delivery to a vessel named, or some other steamship company or line, or vessels chartered thereby, is entitled to recover the possession thereof upon refusal of the master of such vessel to sign any receipt or bill of lading except one containing the provision, "other conditions as per charter party," although the property is in fact owned by the charterer, since such provision would render the carrier liable as for a variation from the terms of the bill of lading, and it is not required to assume any additional liability.<sup>4</sup>

### § 99. *Contract for Through Carriage.*

Railway companies, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. The contracting company is liable upon the other lines as upon its own.<sup>5</sup> It may contract to deliver beyond the limit of the state which incorporated it.<sup>6</sup> The supreme court of Connecticut is the only one denying this proposition.<sup>7</sup> A carry-

<sup>1</sup> *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396; *North v. Merchants & M. Transp. Co.* 146 Mass. 315.

<sup>2</sup> *Wilkinson v. King*, 2 Campb. 335.

<sup>3</sup> *Munn v. Commission Co.* 15 Johns. 44, 8 Am. Dec. 219; *Beals v. Allen*, 18 Johns. 363, 9 Am. Dec. 221; *Thompson v. Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Andrews v. Kneeland*, 6 Bow. 354; *Blane v. Proudfit*, 3 Call, 207, 2 Am. Dec. 546.

<sup>4</sup> *The Torgorm*, 48 Fed. Rep. 584.

<sup>5</sup> *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Hill Mfg. Co. v. Boston & L. R. Co.* 104 Mass. 122, 6 Am. Rep. 202.

<sup>6</sup> *Burtis v. Buffalo & S. L. R. Co.* 24 N. Y. 269.

<sup>7</sup> *Converse v. Norwich & N. Y. Transp. Co.* 33 Conn. 166; *Hood v. New York & N. H. R. Co.* 22 Conn. 502.



ing corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and such a contract is not *ultra vires*.<sup>1</sup>

Where the contract of the initial carrier is not express for through carriage, it becomes a question of fact upon the evidence adduced. It has been held in some cases, that a bill of lading or a receipt for the goods marked to a particular point, and the payment of the full freight to that point, will be sufficient as evidence of such a contract.<sup>2</sup> Any evidence from which the intention of the parties can be properly inferred, is proper as bearing upon this question. Where the defendant was part owner of a line of steamships between San Francisco and the Isthmus of Nicaragua, and was the owner of a connecting line between the isthmus and New York, which he advertised as "Vanderbilt's New Line,—The Only through Line *via* Nicaragua to San Francisco," and an independent line across the isthmus furnished tickets to the defendant, and a common agent of the defendant and the company running its line upon the Pacific coast sold tickets,—one from New York to the isthmus, another across the isthmus;—and another ticket indicating a vessel in which the defendant had no interest, but the tickets entitling the passenger to a continuous passage from New York to San Francisco,—the evidence was regarded as sufficient to hold the defendant liable for the failure of the vessel in which the plaintiff was entitled to transportation from the isthmus to San Francisco to appear; and the consequent delay and illness of the plaintiff occasioned by the climate.<sup>3</sup>

That the cars upon which the goods are placed, pass not only over the initial carrier's line, but over the connecting carrier's, and that the arrangements made for continuous shipping are rec-

<sup>1</sup> *Weed v. Saratoga & S. R. Co.* 19 Wend. 534; *Wylde v. Northern R. Co. of N. J.* 53 N. Y. 156; *Root v. Great Western R. Co.* 45 N. Y. 524; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206; *Jennings v. Grand Trunk R. Co.* 52 Hun. 227.

<sup>2</sup> *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 83, 5 Am. Rep. 92. But see *ante*, § 95.

<sup>3</sup> *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469. See *Hill Mfg. Co. v. Boston & L. R. Corp.* 104 Mass. 122, 6 Am. Rep. 202; *Root v. Great Western R. Co.* 45 N. Y. 532.

ognized by the other roads, that the usage existed for through carriage, that a through rate was paid, and the bill of lading purported to be for through carriage,—are facts which may properly be considered in determining, not only the initial carrier's liability along the whole line, but, in an action against one of the connecting carriers for liability for loss of goods while in its possession.<sup>1</sup> An advertisement by the initial carrier headed,—“Great Through Fast Route to All Points North and East;” “This Reliable through Line makes the Shipment of Cotton and Tobacco a Specialty;” “Contract for a Through Rate;” “Through Rates \$10.25 per Bale from Columbus to Boston;” is said to be evidence that the cotton is the subject of the contract of carriage over the entire line.<sup>2</sup> A bill of lading for the transportation of goods from H. to G. in Texas, and for the delivery at the latter place to the consignee or a connecting carrier, is not a contract for carriage beyond that place, notwithstanding that it guarantees a through rate of freight to a town in Connecticut, which is named in it as the ultimate point of destination.<sup>3</sup>

Where the terms of the receipt of the carrier were “to forward to Dalton,” a point beyond its own line,—it was held that this was not a contract to carry it to that point, but that the carrier was discharged, having safely delivered to a connecting carrier.<sup>4</sup> But, there are authorities which do not sustain such an interpretation of this form of contract, unless there be peculiar circumstances indicating an intent to limit the contract to the carrier's own line.<sup>5</sup> Where goods are marked to a point beyond the line

<sup>1</sup> *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Root v. Great Western R. Co.* 45 N. Y. 524.

<sup>2</sup> *Ecanville & C. R. Co. v. Androscoggin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724. See *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Cundee v. Pennsylvania R. Co.* 21 Wis. 582, 94 Am. Dec. 566; *Berg v. Narragansett S.S. Co.* 5 Daly, 394; *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.

<sup>3</sup> *Bennett v. Missouri Pac. R. Co.* 46 Mo. App. 656.

<sup>4</sup> *Reed v. United States Exp. Co.* 48 N. Y. 462, 7 Am. Rep. 561.

<sup>5</sup> *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan. 505; *East Tennessee & V. R. Co. v. Rogers*, 6 Heisk. 143, 19 Am. Rep. 589; *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Cutts v. Brainerd*, 42 Vt. 566, 1 Am. Rep. 353.

of the carrier receiving it, and a receipt is given stating the marks on the goods, with an engagement to forward by its road and transfer to . . . or order, at its depot in . . . , he or they first paying freight, etc., with a stipulation that, if the merchandise be not called for on its arrival, it will be stored at the risk and expense of the holder,—the carrier will be responsible for the delivery of the goods at the point for which they are marked.<sup>1</sup> A common carrier contracting to deliver goods at a certain place is liable for them after they have been delivered at an intermediate point to another carrier to forward to their destination.<sup>2</sup> Where the liability of the receiving carrier is stipulated to terminate on delivery to another carrier, when the goods were “unloaded from the cars at the place of delivery,” and the cars were transferred to the next carrier without unloading the goods, the contract was construed as a through freight contract, rendering the first carrier liable beyond its terminus.<sup>3</sup>

The successive receipt and forwarding in ordinary course of business, by two or more carriers, of interstate traffic shipped under through bills for continuous carriage over their lines, is assent to a “common arrangement” for such carriage within the meaning of the Act to Regulate Commerce, without previous express agreement between them.<sup>4</sup> The words “common control, management, or arrangement,” as found in the Act to Regulate Commerce, § 1, apply to a case where the initial carrier furnishes the shipper with a car specially fitted up for his business, which is taken over connecting roads on special through time tables.<sup>5</sup> A bill of lading of fruit, issued in Georgia and headed with the name of a certain railroad company “and connections,” stating that the fruit is consigned to certain persons in New York and Philadelphia, to be transported by the company and connecting carriers to the station or wharf nearest its ultimate destination, a guaranty of freight charges for the entire route being taken from

<sup>1</sup> *Cutts v. Brainerd*, 42 Vt. 566, 1 Am. Rep. 353.

<sup>2</sup> *Little v. Semple*, 8 Mo. 99, 40 Am. Dec. 123.

<sup>3</sup> *Toledo, P. & W. R. Co. v. Merriman*, 52 Ill. 123, 4 Am. Rep. 590.

<sup>4</sup> *Troy Board of Trade v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 343.

<sup>5</sup> *Boston Fruit & P. Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 493.

the shippers,—is a through contract for shipment from Georgia to New York and Philadelphia, rendering the company signing it responsible for performance beyond the terminus of its own road.<sup>1</sup> See Ray, *Passenger Carriers*, §§ 148, 158.

Where goods are received by the carrier, guaranteeing that the cost of delivery of the goods beyond its own line shall not exceed a fixed rate, but stipulating against liability beyond its own line, it will not be held liable under a through contract,—although the rate guaranteed is less than the aggregate charges usual on the several lines over which the freight must pass, where this contract is unknown to the other carriers.<sup>2</sup> Where goods are transported over connecting lines, under an agreement that each successive carrier is to receive the goods, advancing the freight charges, and the last one collecting the whole from the consignor, this collection by the final carrier, and payment of the charges to its predecessor, will not render it liable for an injury to the goods before it receives them.<sup>3</sup> A contract of a railroad company to transport to their destination goods marked for transportation to a point beyond its terminus, renders the carrier liable in Georgia for an injury by the negligence of its connecting lines, although such carrier is itself only a connecting line with that to which the goods were originally delivered by the shipper.<sup>4</sup> A bill of lading showing the destination and the consignees, as well as the shipper, saying the goods are shipped in good order, “to be delivered in good order as addressed,” at a certain place beyond the line of the carrier’s road, is a through contract.<sup>5</sup> Where the line of transportation extends through different states, the rights of the parties in case of loss would be governed by the laws of the state where the loss occurred.<sup>6</sup>

The liability of the carriers, where there are connecting lines, and which carrier may be sued, has been the subject of much

<sup>1</sup> *Central R. & Bkg. Co. v. Hasselkus*, 91 Ga. 382.

<sup>2</sup> *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

<sup>3</sup> *Darling v. Boston & W. R. Corp.* 11 Allen, 295.

<sup>4</sup> *Beard v. St. Louis, A. & T. H. R. Co.* 79 Iowa, 527, 42 Am. & Eng. R. Cas. 509.

<sup>5</sup> *Hanson v. Flint & P. M. R. Co.* 73 Wis. 346.

<sup>6</sup> *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

discussion. The English doctrine is, that in the absence of a special contract, the first carrier is liable to the destination—that is, he is exclusively liable,—unless released by contract, or unless the receiving carrier can be considered as agent or partner of the connecting carrier.<sup>1</sup> For want of privity of contract, it is said, that the connecting carrier cannot be sued by the shipper, even though his default has caused the loss or injury. That it is presumed that the initial carrier contracts as controlling the entire line of communication.<sup>2</sup> And it is said that it would be inconvenient for the carrier to seek out the guilty party along the line of a connecting carrier in a distant locality, and establish the fact of negligence or that a loss occurred on that particular division; and that the original carrier has facilities for enforcing a claim on its own behalf against a defaulting connecting carrier, not possessed by the shipper.<sup>3</sup> An initial carrier which assumes liability for the transportation of freight over a through line formed by several carriers, and which is obliged to pay damages resulting from the negligence of a connecting carrier, may recover over against the latter.<sup>4</sup> But where, as is the rule generally in the United States, the fact of original liability in the initial carrier does not exclude a right of action against the intermediate carrier in whose possession the goods are damaged or lost, the force of this objection is materially weakened.

In this country the universal rule,—unless in Georgia<sup>5</sup>—is, that the action will always lie against connecting carriers, in whose possession the goods were at the time of their injury or loss.<sup>6</sup>

<sup>1</sup> *Muschamp v. Lancaster & P. J. R. Co.* 8 Mees. & W. 421; *Mytton v. Midland R. Co.* 25 L. J. Exch. 385; *Bristol & E. R. Co. v. Collins*, 29 L. J. Exch. 41; *Coron v. Great Western R. Co.* 29 L. J. Exch. 165; *Foulkes v. Metropolitan Dist. R. Co.* 28 Week. Rep. 526.

<sup>2</sup> *Bristol & E. R. Co. v. Collins*, *supra*; *Wilby v. West Cornwall R. Co.* 2 Hurlst. & N. 707.

<sup>3</sup> *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Western & A. R. Co. v. McElwee*, 6 Heisk. 208; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92.

<sup>4</sup> *Missouri Pac. R. Co. v. Twiss*, 35 Neb. 267.

<sup>5</sup> *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Mosher v. Southern Exp. Co.* 38 Ga. 37; *Cohen v. Southern Exp. Co.* 45 Ga. 148.

<sup>6</sup> *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Chicago & N. W. R. Co. v. Northern Line Packet Co.* 70 Ill. 218; *Packard v. Taylor*, 35 Ark. 402, 37 Am. Rep. 37; *Halliday v. St. Louis, K. & N. R. Co.* 74 Mo. 159, 41 Am. Rep. 309.

A connecting carrier into whose hands come goods received by another company on a contract with the owner to carry them to their destination, is liable in an action of tort for unreasonable delay in delivering them at their destination, although there are no contract relations between the two companies, or between the owner of the goods and the company causing the damage.<sup>1</sup> But a carrier receiving goods from a connecting carrier will not be responsible for injury to the goods, unless it is shown to have occurred on its line;—even though it acted as agent for subsequent carriers in receiving the goods.<sup>2</sup> Where a forwarder, to whom a carrier delivers goods, is its agent and the agent of the company to whom the same are delivered, and the forwarder gives the bill of lading limiting the duty of the latter to deliver the goods to another company, the bill of lading will be binding upon the first and second carriers, and the second carrier will not be responsible for the delivery of the goods to the consignee by the last carrier.<sup>3</sup>

### § 100. *Contract by Agent for Through Carriage.*

Acceptance of goods, marked to a point beyond the carrier's limit and the payment of a through rate, is not, as has been shown, in most states, held to be prima facie evidence of a contract to deliver the goods at their final destination,—but simply binds the carrier to deliver to the next connecting carrier.<sup>4</sup> The prevailing rule in the states is that the general freight agent has authority to contract for the transportation of goods beyond the limit of the carrier's line.<sup>5</sup> But the station agent of a railway company, under the rule in some states, has no implied power to bind his company to carry goods beyond the terminus of its line.<sup>6</sup>

<sup>1</sup> *Johnson v. East Tennessee, V. & G. R. Co.* 90 Ga. 810.

<sup>2</sup> *Hunt v. New York & E. R. Co.* 1 Hilt, 228.

<sup>3</sup> *Chicago & N. W. R. Co. v. Northern Line Packet Co.* 70 Ill. 218.

<sup>4</sup> *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14; *Cumden & A. R. Co. v. Forsyth*, 61 Pa. 81; *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Hill v. Burlington, C. R. & N. R. Co.* 60 Iowa, 197; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353. See also, *ante*, § 95.

<sup>5</sup> *White v. Missouri Pac. R. Co.* 19 Mo. App. 400.

<sup>6</sup> *Patterson v. Kansas City, Ft. S. & M. R. Co.* 47 Mo. App. 570.

And the station agent of a connecting railroad line has no power, solely by virtue of that position, to waive a provision of a shipping contract between the shipper and the initial carrier limiting the time for suit on a claim for loss or damages occurring on its own line of road.<sup>1</sup>

In *Ingledeu v. Northern R. Co.* 7 Gray, 86, it did not appear that "the defendants assumed any duty in relation to the delivery of the boxes to another carrier," or that they "were charged with any duty in forwarding the rice to Keene, or that the officers of the defendant corporation knew of the transportation beyond their own line." Where a corporation has a general agent, who is employed by it for the express purpose of receiving and transporting merchandise for hire, and he is held out to the world as invested with authority for this purpose, if goods are delivered to him to be transported in the way of his duty, the corporation will be liable for the manner in which the duty is performed, and the contract of bailment may be regarded as made with it.<sup>2</sup>

Station agents are, under the rule sometimes announced, to be presumed to have the power to make contracts for their railroads, for the transportation of freight. The limitations of their powers the public cannot take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.<sup>3</sup> The question, whether or not the railway station agent is, as such agent, authorized to bind such company by a contract to furnish cars to a shipper at his stations at a particular time, is, in other courts, one of fact and not of law.<sup>4</sup> The single act of an assumed agent, and a single recognition of his authority by the principal, if sufficiently unequivocal, positive and comprehensive in its character, may be sufficient proof in other similar acts.<sup>5</sup> Authority to an agent to do a thing, generally includes everything usual and necessary for the accomplishment of the main object.<sup>6</sup>

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Clarke*, 5 Tex. Civ. App. 547.

<sup>2</sup> *Mayall v. Boston & M. R. Co.* 19 N. H. 122, 49 Am. Dec. 149.

<sup>3</sup> *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527.

<sup>4</sup> *Wood v. Chicago, M. & St. P. R. Co.* 59 Iowa, 196.

<sup>5</sup> *Wilcox v. Chicago, M. & St. P. R. Co.* 24 Minn. 269.

<sup>6</sup> *Holman v. Georgia R. Co.* 67 Ga. 595.

Occasionally courts in this country and in England, which raise an implication of the carrier's contract to transport beyond its own line, are inclined to assume the power of the agent who entered into such contract,<sup>1</sup> and the courts also, on the other hand, which require proof of the contract to transport beyond the carrier's line, admit more readily, on slight evidence, the power of the general agent,<sup>2</sup> than that of a local agent.<sup>3</sup>

<sup>1</sup> *Hansen v. Flint & P. M. R. Co.* 73 Wis. 346; *Bristol & E. R. Co. v. Collins* 7 H. L. Cas. 194.

<sup>2</sup> *Grover & B. Sewing Mach. Co. v. Missouri Pac. R. Co.* 70 Mo. 672, 35 Am. Rep. 444.

<sup>3</sup> *Burroguhs v. Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Turner v. St. Louis & S. F. R. Co.* 20 Mo. App. 632.



## CHAPTER XIV.

### LIABILITIES—CHARGES—FACILITIES—CONNECTING CARRIERS —COMBINATIONS.

- § 101. *Stipulation of Initial Carrier Limiting Liabilities.*
- § 102. *Freight Charges of Connecting Carrier.*
- § 103. *Carrier Assuming Joint and Several Liability—Partnership.*
- § 104. *Facilities Furnished Connecting Carrier.*
- § 105. *Provisions Enforcing Connections and Forbidding Combinations.*

#### § 101. *Stipulation of Initial Carrier Limiting Liabilities.*

Where the contract of carriage is construed to be with the first carrier over the entire line, rendering such carrier responsible for the final delivery of the goods, connecting carriers, who continue the transportation beyond the line of the first carrier, are but its representatives, and entitled therefore, to all the benefits of any contract it may make diminishing its common law liability.<sup>1</sup> Where goods were delivered at Bath, marked for delivery at a point beyond the line of the Great Western R. Co., and were destroyed by fire on the line of a connecting carrier, the latter was held not entitled to the benefit of a stipulation exempting the first carrier from liability from losses or damage by fire.<sup>2</sup> It was subsequently held, however, that, where goods were received at the Great Western Railway Company's station at Bath, to be forwarded to Torquay, and at Bristol the goods were to be placed on the South Devon line to reach Torquay,—the receipt note at Bath stating that the goods were received "to be sent to Torquay station and delivered to R. C. Collins, Consignee

<sup>1</sup> *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73; *Kiff v. Atchison, T. & S. F. R. Co.* 32 Kan. 263; *Whitworth v. Erie R. Co.* 87 N. Y. 414; *Taylor v. Little Rock, M. R. & T. R. Co.* 39 Ark. 148.

<sup>2</sup> *Collins v. Bristol & E. R. Co.* 1 Hurlst. & N. 517.

of the Agent," and the goods were destroyed by fire while on the Bristol & Exeter line, reversing the judgment of the Exchequer Chamber—that the contract was with the Great Western Company and the Bristol & Exeter Company was not liable.<sup>1</sup>

One of several carriers giving a through bill of lading for transportation of freight over a through line, formed by it and other carriers, has been held the agent of the others to accomplish the carriage and delivery of the goods, and as primarily liable for a loss occurring on its own or one of the connecting lines,<sup>2</sup> and one of such connecting railways receiving goods from another, is entitled to the benefit of any stipulation which the original carrier may have made with the shipper.<sup>3</sup>

A carrier receiving freight from another carrier under an agreement between the latter and the shipper is entitled to the benefit of any valid limitation of the first carrier's liability, just as it is liable for any failure to perform its part of the contract,<sup>4</sup> and it must be regarded on principle as the safer rule to hold the shipper as contracting for one liability as to all connecting carriers,<sup>5</sup> although it has been said that a carrier cannot be considered as ratifying the original contract of shipment for goods which it receives from another company and transports, when it is bound by statute to perform such service.<sup>6</sup>

A railroad company forming part of a through line from the southern states to Boston, having contracted to carry cotton from Columbus, Mississippi to Boston, a clause in the bill of lading that it "The Evansville & Crawfordsville Railroad Company, will not be liable for loss or damage by fire from any cause whatever"—covered the entire route, and was not to be limited to a part of the distance only, and the company is not liable for cot-

<sup>1</sup> *Bristol & E. R. Co. v. Collins*, 5 Hurlst. & N. 969, 7 H. L. Cas. 197.

<sup>2</sup> *Missouri Pac. R. Co. v. Weiss*, 35 Neb. 267.

<sup>3</sup> *Manhattan Oil Co. v. Camden & A. R. Co.* 52 Barb. 72, 5 Abb. Pr. N. S. 289, 54 N. Y. 197; *Lamb v. Camden & A. R. Co.* 2 Daly, 454; *Maghee v. Camden & A. R. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Babcock v. Lake Shore & M. S. R. Co.* 43 How. Pr. 317.

<sup>4</sup> *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397.

<sup>5</sup> See *Lamb v. Camden & A. R. Co. supra*; *Whitworth v. Erie R. Co.* 13 Jones & S. 602, affirmed in 87 N. Y. 414; *Lery v. Southern Exp. Co.* 4 S. C. 234.

<sup>6</sup> *Dwyer v. Gulf, C. & S. F. R. Co.* 7 L. R. A. 478, 75 Tex. 572.

ton destroyed by fire on the route before it reached the said company's road.<sup>1</sup> Shippers of goods which are damaged in a manner for which the bill of lading given by the steamship company, in whose charge the goods were at the time of the damage, exempts the steamship company from liability, cannot recover therefor from the steamship company's connecting railroad line, as such railroad would have no recourse to the steamship company.<sup>2</sup>

Where the freight through to Baltimore is stated in a steamboat bill of lading, for the shipment of goods at Memphis to be delivered at Cairo, and the bill of lading is signed by an agent of a connecting railroad company, the contract is one for through shipment,—and the railroad company is entitled to the benefit of the exceptions contained in the bill of lading.<sup>3</sup> Under a freight transportation contract referring to and embracing connecting lines, the connecting carriers may adopt and act upon it, and thereby become entitled to the benefit of the valid exemptions therein, although it is not for through transportation and though no rate for the entire distance is fixed.<sup>4</sup>

Where the contract of carriage is with the first carrier simply to carry over its own line and deliver to the connecting carrier, stipulations restricting liability are held by some of the courts to be for the benefit of such initial carriers only.<sup>5</sup> And a common carrier having discharged his own contract of transportation, cannot enter into a special contract on behalf of the owner, with the next carrier, limiting or restricting the liability of the latter.<sup>6</sup>

A connecting carrier is not entitled to the benefit of provisions in the bill of lading taken by the initial carrier, if it makes a new

<sup>1</sup> *Evansville & C. R. Co. v. Androscoggin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724.

<sup>2</sup> *East Tennessee, V. & G. R. Co. v. Wright*, 76 Ga. 532.

<sup>3</sup> *Woodward v. Illinois Cent. R. Co.* 1 Biss. 447.

<sup>4</sup> *Western R. Co. v. Haricell*, 91 Ala. 340, 45 Am. & Eng. R. Cas. 358.

<sup>5</sup> *Western & A. R. Co. v. Exposition Cotton Mills*, 2 L. R. A. 102, 81 Ga. 522; *Mughee v. Camden & A. R. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Babcock v. Lake Shore & M. S. R. Co.* 49 N. Y. 491; *Manhattan Oil Co. v. Camden & A. R. & Transp. Co.* 54 N. Y. 197; *Etna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Merchants Despatch Transp. Co. v. Bolles*, 80 Ill. 473; *Brancroft v. Merchants Despatch Transp. Co.* 47 Iowa, 262, 29 Am. Rep. 482.

<sup>6</sup> *Babcock v. Lake Shore & M. S. R. Co.* 49 N. Y. 491.

contract upon taking the goods from the latter, and gives a new bill of lading stating the extent of its liability.<sup>1</sup> A contract with a carrier to which horses are first delivered for shipment to a point on the line of another carrier, limiting liability for injury to them, does not enure to the benefit of the latter carrier, where it repudiates the contract, requires the execution of a new contract, and collects additional freight.<sup>2</sup> A connecting carrier between whom and the initial carrier no privity or contractual relation is shown, the contract of shipment having been made with the initial carrier to transport the goods to their destination, was held not liable on an implied contract to deliver the goods, for damages because of a delay in making delivery, whether such delay occurred on its own line or not, the remedy of the shipper being against the initial carrier.<sup>3</sup> In Canada there is no privity of contract which will support an action by the consignee against a carrier for loss of goods shipped under a bill of lading given by a connecting carrier.<sup>4</sup> If a contract by a carrier for transportation is invalid, the liability of a connecting carrier by whose negligence the goods are lost or damaged must be determined under the principles of the public law.<sup>5</sup>

The rules of one of the connecting roads other than the contracting railroad cannot influence or affect the contract, although part of the goods were put on board on such connecting road.<sup>6</sup> An intermediate carrier, it has been decided, can derive no benefit from a contract between the first carrier and the shipper, limiting the former's liability, which makes no provision for an extension of its benefits to any other than the first carrier.<sup>7</sup>

It is said that a connecting carrier cannot shield itself from lia-

<sup>1</sup> *Browning v. Goodrich Transp. Co.* 10 L. R. A. 415, 78 Wis. 391.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210.

<sup>3</sup> *East Tennessee, V. & G. R. Co. v. Johnson*, 85 Ga. 497.

<sup>4</sup> *Richardson v. Canadian Pac. R. Co.* 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

<sup>5</sup> *Woodburn v. Cincinnati, N. O. & T. P. R. Co.* 40 Fed. Rep. 731.

<sup>6</sup> *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827.

<sup>7</sup> *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73; *Babcock v. Lake Shore & M. S. R. Co.* 49 N. Y. 491.

bility for the goods damaged by reason of the defective condition of a car upon the ground that the car belonged to the other company,<sup>1</sup> and yet the same court rules that under S. C. Gen. Stat. § 1471, a railroad cannot refuse to receive and attach to its train and transport cars of connecting roads, although they are of an old pattern and not so safe and convenient as its own.<sup>2</sup> The last carrier in connecting lines must deliver the shipment at the place of destination to the consignee there, if he was made known to it in receiving the freight from the preceding connecting company.<sup>3</sup>

### § 102. *Freight Charges of Connecting Carrier.*

The general freight agent of the receiving line has no power to bind the connecting line by an announcement of the rate for freight over it.<sup>4</sup> A carrier who receives goods from another, destined to a point on its line, without making a new contract, does not thereby become a party to and bound by the contract made by the initial carrier with the owner, if he has no notice of its terms. A connecting carrier which advances the charges of the preceding one at the usual rates, without notice of any special arrangement between it and the owner, can demand of the consignee payment of the charges so advanced; and the owner must look for reimbursement to the contracting carrier upon its guaranty.<sup>5</sup> A connecting carrier to which is delivered for transportation goods shipped from another state and waybilled over its line, for which the initial carrier without its knowledge gave a bill of lading over another connecting line at the schedule rate of the latter, which is less than that of the former, is not liable for the statutory pen-

<sup>1</sup> *Wallingford v. Columbia & G. R. Co.* 26 S. C. 258.

<sup>2</sup> *Simms v. South Carolina R. Co.* 26 S. C. 490. See *Richardson v. Great Eastern R. Co.* L. R. 10 C. P. 486, as to duty of the carrier to examine condition of cars received from another carrier.

<sup>3</sup> *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 737, 31 L. ed. 287.

<sup>4</sup> *Hill v. Burlington, C. R. & N. R. Co.* 60 Iowa, 196, 9 Am. & Eng. R. Cas. 21.

<sup>5</sup> *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50.

alty for failure to deliver the goods on tender of the charges named in the bill of lading, as it cannot be compelled to receive less than its established rate and thus become guilty, under the Interstate Commerce Act, of a misdemeanor and subject to fine and imprisonment.<sup>1</sup> Connecting carriers are not bound by a stipulation in a bill of lading issued by the carrier to whom the goods are delivered, that the total cost of transportation shall not exceed a certain sum, where the bill of lading does not purport to be a true one and there is no traffic between them and the first carrier; and they are not liable for refusal to deliver the goods except upon payment of their transportation charges exceeding such sum, where they have no knowledge of such agreement or of the prepayment of the freight, although the bill of lading shows that the freight was prepaid.<sup>2</sup>

There can be no recovery for damage to goods sustained, without fault or negligence of the last carrier, while they were rightfully detained to await payment as preliminary to making delivery to the consignees, where the first and last carriers are independent. Where the bill of lading issued by the former is silent as to any contract to ship the goods as "released" or at a reduced rate, and the last carrier paid charges and earned freight without notice of a contract outside of the bill of lading, the right to hold the goods for payment of the charges advanced and freight earned on the basis of ordinary rates is not affected by any secret outside contract.<sup>3</sup> A railroad company guaranteeing delivery of cotton shipped over its own road and connecting lines, at a specified rate of freight, and giving a bill of lading containing a provision that "it is understood that railroads connecting with this line recognize its bill of lading and will settle freight bill accordingly," is liable for the whole amount of overcharges made and collected by its connecting carriers; and it cannot evade liability by urging a stipulation in the bill of lading that it shall not be liable for damages to the cotton after leaving its own line of road, as

<sup>1</sup> *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

<sup>2</sup> *Moses v. Port Townsend S. R. Co.* 5 Wash. 594.

<sup>3</sup> *Georgia R. Co. v. Murray*, 85 Ga. 453, 8 Ry. & Corp. L. J. 247.

such stipulation has no application to freight rates.<sup>1</sup> A carrier is not liable for rates made by a connecting road.<sup>2</sup>

Where the first company by which goods are shipped to be transferred over connecting lines gives a bill of lading stating a certain sum as the full rate, and on their arrival at their destination the connecting carrier demands and the shipper pays an excess over the sum agreed upon, such shipper cannot recover back the excess from the latter company in the absence of some agreement with it.<sup>3</sup> An initial railroad company which delivers a through bill of lading to a shipper is not liable for the penalty of \$500 imposed by Sayles's (Tex.) Civ. Stat. arts. 4257, 4258, for exacting more than the maximum freight rates, where it delivered the goods to a connecting carrier by which the overcharge was exacted.<sup>4</sup> A railroad company which has agreed with connecting lines upon a joint tariff of rates in compliance with the Interstate Commerce Act is required to collect the interstate commerce rate for freight passing over its own and such lines and which it delivers to the consignee, and not a smaller sum named in the bill of lading issued by the initial carrier.<sup>5</sup> Where one of connecting carriers, over whose lines goods are shipped, collects the full legal rate for the entire distance, the same should be divided between the companies upon some equitable principle, and the courts will determine what this should be, on the failure of the carriers to agree.<sup>6</sup>

The mere reception and continuous transportation by a railroad company, of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading and quoted through rates, does not constitute such an "arrangement" as to bring the carrier under the Act to Regulate Commerce, § 1, where the through rates,

<sup>1</sup> *Little Rock & Ft. S. R. Co. v. Daniels*, 49 Ark. 352.

<sup>2</sup> *Allen v. Louisville, N. A. & C. R. Co.* 1 Inters. Com. Rep. 621; *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>3</sup> *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.* 106 N. C. 207, 42 Am. & Eng. R. Cas. 498.

<sup>4</sup> *Gulf, C. & S. F. R. Co. v. Adair* (Tex. App.) Dec. 7, 1889.

<sup>5</sup> *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50.

<sup>6</sup> *Ackley v. Chicago, M. & St. P. R. Co.* 36 Wis. 252.

so quoted, allow to that company its full local rates. Where a contract is made with a shipper by a carrier, member of a through line, for shipment of goods over the line at a less rate than the published lawful rate charged shippers in general, it is not a violation of the Act to Regulate Commerce, within the jurisdiction of the Interstate Commerce Commission, for the delivering carrier to exact payment of the full lawful rate before delivery, although if the shipper was an innocent party he might be entitled to his goods on payment of the contract rate.<sup>2</sup> A steamship line is not entitled to *pro rata* freight upon cotton shipped by it, to be transported from Galveston and New Orleans to New York and thence to European ports by steamer from New York under through bills of lading providing that none of the different carriers are to be responsible for any damages except such as occur on their own parts of the route, where the cotton is totally destroyed by fire without its fault while on its pier in New York awaiting transshipment; but is entitled to *pro rata* freight out of the proceeds of a portion of the cotton damaged and sold for the best interest of the carrier, owner, and insurer, and for their joint account and benefit.<sup>3</sup>

Where, for the purpose of making its own mileage more and the mileage of the forwarding carrier less, the receiving carrier—having two alternative routes for through traffic, one longer than the other,—sought, for the purpose of a through route, to carry by the longer one at a greater cost and labor in working and maintaining the junctions,—such longer route, it was ruled, was not a reasonable route within the meaning of section 11 of the English regulation of Railways Act, 1873.<sup>4</sup> Where the carrier of goods to a connecting line not having accommodations at the junction, was compelled to convey the goods three miles beyond the junction to a station on its own line, and then sent them back to the junction by another train, it is entitled, in estimating the

<sup>1</sup> *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332.

<sup>2</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>3</sup> *British & F. M. Ins. Co. v. Southern Pac. R. Co.* 55 Fed. Rep. 82.

<sup>4</sup> *East & West Junction R. Co. v. Great Western R. Co.* 1 Nev. & McN. 331.



mileage proportionately between the two companies, to charge mileage one way over the two miles.<sup>1</sup>

A shipper of goods to a city in a foreign country over two railroads connecting at the border, by through bill of lading providing that, if the freight is removed at the connecting point, it shall be regarded as a local shipment to such point and the full proper rate to such point collected, cannot withdraw the goods at such point upon payment merely of the *pro rata* which the first road would have received under the through shipment, where the shipment was made with knowledge of the local rate, and intent to withdraw upon payment of the lesser *pro rata* rate.<sup>2</sup> A shipper cannot recoup damages done by one connecting carrier against a subsequent carrier's claim for freight, where he was present when it received the property and made no objection, though he informed it of the damage and intimated his intention to demand compensation from the previous carrier.<sup>3</sup>

### § 103. *Carriers Assuming Joint and Several Liability—Partnership.*

Several carriers forming a continuous line by agreement, are each—jointly and severally—liable for losses occurring on any part of their line.<sup>4</sup> Thus associated for the transportation of freight between two designated points, charging through freight and giving through bills of lading, they are chargeable as common carriers between these points.<sup>5</sup> Where each of two connecting common carriers forming a continuous line of transportation, is competent to contract alone for transportation over the entire line, they are competent to make a joint contract for such transportation and thus become joint carriers and jointly liable for loss or damage to goods transported under such joint contract.<sup>6</sup> The

<sup>1</sup> *Buckfastleigh, T. & S. D. R. Co. v. South Devon R. Co.* 1 Nev. & McN. 321.

<sup>2</sup> *Southern Pac. R. Co. v. Haas* (Tex.) Nov. 3, 1891.

<sup>3</sup> *St. Louis, I. M. & S. R. Co. v. Lear*, 54 Ark. 399.

<sup>4</sup> *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

<sup>5</sup> *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. 4.

<sup>6</sup> *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

power of corporations thus to become joint carriers is recognized and is founded on public convenience and business principles.<sup>1</sup>

Where several carriers engaged in traffic in a special product each had its own line; but in connection with other lines of an association of carriers, continuous lines were formed, for which carriers' agents solicited shipments and granted through bills of lading for one sum, that consignees paid, and the carriers divided among them, as to third parties with whom they contracted, the several carriers in association are liable for a loss taking place on any part of the whole line.<sup>2</sup> Being thus associated, they are obligated to carry through from place of shipment to destination by their vocation and holding out.<sup>3</sup>

The question of the agency of one railroad company for another company depends, so far as the public and passengers are concerned, not upon the actual fact of an arrangement or contract between the two companies, but upon what the former company, by holding itself out as the latter's agent, invited the public to believe.<sup>4</sup> When several carriers unite to complete a line of transportation, and receive goods for one freight, they are each liable for damages during transportation, subject to reclamation against the party by whose act the damage occurred.<sup>5</sup> Where carriers thus form a continuous line, accepting one price for transportation, which is divided in fixed proportions,—the carrier first re-

<sup>1</sup> *Aigen v. Boston & M. R. Co.* 132 Mass. 423; *Block v. Fitchburg R. Co.* 139 Mass. 308; *Gass v. New York, P. & B. R. Co.* 99 Mass. 220, 96 Am. Dec. 742; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 146, 26 L. ed. 679; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 454; *Wylde v. Northern R. Co. of N. J.* 53 N. Y. 156; *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206.

<sup>2</sup> *Barter v. Wheeler*, *supra*; *Bradford v. South Carolina R. Co.* 7 Rich. L. 201, 62 Am. Dec. 411; *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duv. 4; *Nashua Lock Co. v. Worcester & N. C. R. Co.* 48 N. H. 339, 2 Am. Rep. 242; *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602; *Baltimore & P. S. B. Co. v. Brown*, 54 Pa. 77; *Hart v. Rensselaer & S. R. Co.* 8 N. Y. 37, 59 Am. Dec. 447; *Evansville & C. R. Co. v. Androscoggin Mills*, 89 U. S. 22 Wall. 594, 22 L. ed. 724; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Coates v. United States Exp. Co.* 45 Mo. 235; *Gass v. New York, P. & B. R. Co.* and *Aigen v. Boston & M. R. Co.* *supra*.

<sup>3</sup> *Merchants Dispatch Transp. Co. v. Bloch*, 86 Tenn. 398; *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 680, 23 L. ed. 296.

<sup>4</sup> *Dye v. Virginia M. R. Co.* 9 Mackey, 63.

<sup>5</sup> *Richardson v. The Charles P. Chouteau*, 37 Fed. Rep. 532.

ceiving the goods is bound for their safe carriage through the entire line,<sup>1</sup> and having entered into a joint contract for transportation, one of them cannot introduce evidence that another neglected to furnish cars.<sup>2</sup> The fact that the railways of two or more corporations are operated jointly and under a common management, the earnings of both going into a common purse, and the carriages and trains of either running over the lines of the other, are either or all of them evidence tending to show such partnership.<sup>3</sup>

The giving of a through bill of lading by a carrier contracting to carry goods, the making of through freight charges, the furnishing of one car for the whole distance, and the act of the agent at the end of the route (being the agent of another company than the receiving company) in receiving the whole freight money,—sufficiently show joint liability on the part of the two carriers for failure to deliver the goods according to the contract made by the receiving carrier.<sup>4</sup>

Carriers over different routes who associate themselves under a contract for a division of profits in certain proportions, or of the receipts after deducting expenses, are jointly liable as partners to third persons; but no joint liability exists where the agreement is that each shall bear the expenses of his own route, and that the gross receipts shall be divided in proportion to the distance or otherwise.<sup>5</sup> The owners of several steamers operated jointly for their own benefit under the name of a certain line are all liable as partners or joint traders on a contract of affreightment, made by their authorized agent, in such name, to carry goods in one of the steamers.<sup>6</sup>

But no partnership or joint liability between carriers is created by the single fact, that one rate is given for the carriage of a con-

<sup>1</sup> *Nashua Lock Co. v. Worcester & N. R. Co.* 48 N. H. 339, 2 Am. Rep. 242.

<sup>2</sup> *Sisson v. Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

<sup>3</sup> *Pearce v. Madison & I. R. Co.* 62 U. S. 21 How. 441, 16 L. ed. 184; *Champion v. Bostwick*, 18 Wend. 175, 31 Am. Dec. 376; *Cobb v. Abbot*, 14 Pick. 289; *Hart v. Rensselaer & S. R. Co.* 8 N. Y. 37, 59 Am. Dec. 447; *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. Dec. 469.

<sup>4</sup> *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.

<sup>5</sup> *Peterson v. Chicago, R. I. & P. R. Co.* 80 Iowa, 92, 8 Ry. & Corp. L. J. 95.

<sup>6</sup> *Braithwaite v. Power*, 1 N. D. 455.

tinuous route,<sup>1</sup> and although the carrier receiving the goods has an arrangement with the next carrier for rates on "through fare" to be divided *pro rata*, it will not be liable under a through contract beyond its own line, where the stipulation in the bill of lading given is that goods are to be transported to the terminus of its road, and there transferred to agents of connecting roads, and that the company alone in whose care the goods are damaged shall be answerable.<sup>2</sup> A railroad company whose line is one of several connecting roads, in the absence of special contract or of an association or copartnership by which each of the connecting lines is liable for the contracts of the others, is not responsible for damage for negligence occurring beyond its own terminus. In such case its liability is confined to that of a forwarding agent.<sup>3</sup>

One of several independent steamers constituting a certain well known line, belonging to different owners who are not interested in the business of any vessels except their own, which fails to take all the cotton specified in bills of lading given by the agent of the line, where the bills for the whole quantity were made out in the name of that vessel in exchange for shipping receipts which, by mistake of the employes of such agent, named that vessel instead of giving the agent an option between that and the vessel next following, as agreed on in a contract for shipment between the agent and the owner of the cargo,—is not liable for loss on account of a fall in the market price before the arrival of the next vessel, but is liable for the premium paid for insurance on the cotton which was not actually carried.<sup>4</sup>

Connecting carriers are not partners, so as to render one line liable for anything more than the damage done on its own road, under a contract made with another line providing that the liability of the latter shall cease at the end of its own line, and that

<sup>1</sup> *Burroughs v. Norwich & W.R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *Aigen v. Boston & M. R. Co.* 132 Mass. 423; *Block v. Fitchburg R. Co.* 139 Mass. 308; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *Goldsmith v. Chicago & A. R. Co.* 12 Mo. App. 479; *Snider v. Adams Exp. Co.* 63 Mo. 383; *Citizen's Ins. Co. v. Kountz Line*, 4 Woods, 268.

<sup>2</sup> *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391.

<sup>3</sup> *Knott v. Raleigh & G. R. Co.* 98 N. C. 73.

<sup>4</sup> *Crenshaw v. Pearce*, 43 Fed. Rep. 803.

"the terms of this contract apply to any and all roads which are a part of this route," in view of Tex. Rev. Stat. art. 4251, making it the duty of every railroad company to draw over its road the passengers, merchandise, and cars of every other railroad company which connects with its road.<sup>1</sup> A railroad company entering into a contract with connecting lines for carrying cattle, the contract providing that its liability shall cease at its terminus, is not liable, as a member of a partnership or as a joint contractor, for injuries to the cattle on a road other than its own.<sup>2</sup> Where a contract is made for the transportation of cattle to a point beyond the line of the road of the company with which the contract is made, the liability of the contracting road to cease at its terminus, a connecting company to which the cattle, after being transported over several roads, are finally delivered and by which they are delivered at their destination and all charges collected for carriage, is not liable as a partner or joint contractor for injuries received by the cattle on roads other than its own.<sup>3</sup>

Railroads not actually connected, but having an arrangement under which goods carried on one line, designated to pass over the other line, or some point thereon, are delivered to the second carrier with the bill of expenses already incurred,—which forms the foundation for a waybill,—the second company will not be liable except as a warehouseman, until the delivery of the bill of expenses.<sup>4</sup> An arrangement for freight and passenger traffic, which is clearly terminable, so far as its terms indicate, at will, may be terminated without previous notice.<sup>5</sup>

#### § 104. *Facilities Furnished Connecting Carrier.*

The third section of the Interstate Commerce Act provides, among other things that, "every common carrier subject to the provisions of this Act shall, according to their respective powers,

<sup>1</sup> *Ft. Worth & D. C. R. Co. v. Fuller*, 3 Tex. Civ. App. 340.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Baird*, 75 Tex. 256, 40 Am. & Eng. R. Cas. 160.

<sup>3</sup> *Ft. Worth & D. C. R. Co. v. Williams*, 77 Tex. 121, 42 Am. & Eng. R. Cas. 464.

<sup>4</sup> *Judson v. Western R. Corp.* 4 Allen, 520, 81 Am. Dec. 718.

<sup>5</sup> *Investment Co. of Philadelphia v. Ohio & N. W. R. Co.* 41 Fed. Rep. 378.

afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." Where a railroad company, having ample facilities for physical connection and through business with a connecting line, with which it has in the past long had an arrangement for doing a through business on a prorating basis, terminates that arrangement without any good reason and enters into a similar arrangement with another connecting line, and refuses further through business over its former connection; this conduct is unjust discrimination within the meaning of the language above quoted. That a carrier has a special contract with an independent corporation of which it owns half the stock, making them a combination of carriers, does not make the railroad of the latter part of its own line, so that the furnishing to it of superior facilities for the exchange of interstate traffic will not constitute undue discrimination against a road connecting physically with itself.

Where the only link between the carrier and its favored connecting line is such community of interest as springs from the existence of the contract for the interchange of traffic, if it be that such a contract makes each line a mere continuation or extension of the other, it is hard to conceive how a case of refusing equal facilities could ever be made out. The very granting of superior facilities to one line would make it a part of the one that favored it, and no longer a connecting road, when compared with its unsuccessful rival. Where the "arrangements" between several roads are such that they form a combination of carriers, within the meaning and effect of section 1, so as to make them a legal unit within the provisions of the Act, as such, they are jointly responsible for affording equal facilities in proper cases to competing lines connecting with such combined continuous lines. But, besides the duty which any one of these corporations

may owe, jointly with the others, it is not relieved from its obligations under the Act to all roads which connect directly with itself.<sup>1</sup>

A common carrier by rail, to which property is offered for transportation, cannot in any indirect manner and by refusal to perform obligations imposed by law upon it, enforce its contracts, but must for that purpose resort to the customary remedies. Nor can a common carrier, as a reason for refusal to afford to another common carrier the customary reasonable and equal facilities for the interchange of traffic, assign the fact that such other common carrier supplies no public necessity, the public having been fully accommodated without it.<sup>2</sup> The provisions of section 1, requiring charges to be reasonable and just, and of section 2, forbidding unjust discrimination, apply when exceptional charges are made under section 4, as they do in other cases.<sup>3</sup> But neither this, nor any other provision of the law, requires of the common carrier of interstate commerce, the duty of either forming new connections, or of establishing new stations for the reception and delivery of freights. The Act to Regulate Commerce deals with such common carriers as it finds them, and leaves to them full discretion, as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. The fact that one connecting railway company has a contract for the interchange of interstate commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, will not authorize a court of equity to compel the receiving railway to grant a like contract or compensation to another connecting company. No common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is.<sup>4</sup> When railroad companies, in

<sup>1</sup> *New York & N. R. Co. v. New York & N. E. R. Co.* 4 Inters. Com. Rep. 117, 50 Fed. Rep. 867.

<sup>2</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 103, 2 L. R. A. 289.

<sup>3</sup> *Re Southern R. & S. S. Asso.* 1 Inters. Com. Rep. 278.

<sup>4</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark. 59 Fed. Rep. 400.

compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots, for the accommodation of their business, the law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers. Congress has certainly not undertaken, even if it possessed the power, to deal with such matters.

When a new railroad makes a physical connection with an old railroad, at a point other than the established yard or depot of the old road, but neither company has any yard, station, depot, or ground, at the point of connection; nor any buildings, sheds, or platforms there, for the reception and accommodation of freights, to be handled and exchanged at that point; nor any clerks or employes, stationed there for the inspection of cars, reception of freights, etc.; an interchange of traffic at such a point cannot be made in a proper and convenient way to either company; and no authority is conferred upon the Commission, or upon a United States circuit court, to compel the old company to provide at said point of connection the same or equal facilities, which it had previously provided at its regular, established yards and depots. Where there are no facilities at said connection, for receiving, forwarding, or delivering freight, individual shippers, or consignees of freight, have no right to require the old company to receive or deliver their traffic, at such point of connection; and the new company, or other companies using its tracks, cannot properly demand, or require of the old company, to concede to it, or them, rights and facilities, which the old company is under no obligation, or duty, to grant, or provide for individual owners or shippers of interstate commerce. This would be conferring upon common carriers, engaged in transporting interstate traffic, rights and privileges superior to those intended for the benefit of such commerce itself. The tracks and terminal facilities of a railroad company can be used by a connecting company for the exchange of interstate freight, only with the consent of the former. Refusal to permit a forwarding company to perform an act involving the use of the tracks and terminal facilities of a



receiving company is not a discrimination or denial of equal facilities by one carrier to a connecting carrier.<sup>1</sup> The law was not designed to advance the interests of carriers; but was intended for the benefit and advantage of the commerce they transported; and the provisions of the Act all look to that as its object and purpose. The fact that a railroad company interchanges traffic with certain railroads, at its regular established yard or depot (where it has provided all reasonable, proper, and equal facilities for that purpose) and refuses to interchange traffic with a new road, at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "undue, or unreasonable preference or advantage," in favor of the railroads with which such interchange is made. The third section of the Act does not mean that whatever facilities a railroad company may furnish, or provide, for the interchange of business with connecting lines, at any one place (such as its regularly established and properly equipped depot) it is bound to provide for any, and all other railroads, at such other and different points as they may select in making their connection. On the contrary, said section means, that where a railroad subject to the provisions of the Act has provided and established, at any given place, its facilities, in the shape of yards, stations, and depots, for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines at that point, the same proper, reasonable, and equal facilities.

It by no means follows because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines at one point, upon certain terms, conditions and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making a physical connection with the road (furnishing such facilities) at another, different, and distant place, is entitled to demand at said different point of connection, the same, or equal

<sup>1</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 59 Fed. Rep. 400.

facilities. The company making the physical connection, at a point other than that at which the established road has already provided its facilities, and conducts its interchange, with other connecting lines, cannot demand or require an interchange at such point of physical connection, without first furnishing at such point, reasonable, and proper facilities, for the interchange sought. It cannot rely upon the terminal facilities at another point of the road, with which it has formed the physical connection; nor can it compel the road, with which the connection is made, to join with it, in the expense of providing at that point, the facilities necessary and proper for the interchange.<sup>1</sup>

No provision of the Act confers equal facilities upon connecting lines, under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the law, between discriminations and preferences which are just and reasonable, and those which are unjust and unreasonable, according as they are made, or given, under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden, or made unlawful; but only such as are unjust, or undue, or unreasonable. In each, and every case, therefore, the question whether a discrimination is unjust, or a preference is undue, or unreasonable, either as to the common carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions, under which such discrimination, or preference, is made or given.

An interchange of traffic at a new point of connection between railroads, where there are no buildings, sheds, platforms, or other facilities, for the proper care, protection, and handling of freight, and no clerks, or employes, stationed there to look after, and attend to the business, cannot possibly be carried on, without requiring the old road to concede the use of its track and terminal facilities to the new road, or without imposing upon the old road the trouble, inconvenience, and expense of handling the traffic interchanged between them; and neither the Commission, nor a United States circuit court, has any authority to require the old

<sup>1</sup>*Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 59 Fed. Rep. 400.

road to concede the use of its tracks and terminal facilities, in order to accomplish an interchange of traffic, nor can a court, or the Commission, impose upon the old road the duty of making such interchange, at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employes. Such interchanges between railroads are arranged by mutual agreements, fixing the compensation to be paid for services, and for the use of improvements, and providing for "prorating," the expense incident to such interchange. But if the parties cannot themselves agree upon such terms, neither a court nor the Commission can make an agreement for them, under the existing law. The provision in the third section of the Act, to the effect that a common carrier shall not be required "to give the use of its tracks and terminal facilities, to another carrier engaged in like business," is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities, for the interchange, or for the receiving, forwarding, and delivering, of traffic to, from, and between, connecting lines; and therefore it is left open to any common carrier to contract, or enter into arrangements, for the use of its tracks and terminal facilities, without subjecting itself to the charge of giving an undue, or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in such arrangements. No common carrier can, therefore, justly complain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions, which, under private contract or agreement, are conceded to other lines. A railroad company cannot be compelled to receive freight from a connecting road in cars other than its own, although it receives freight from another competing road in the cars of the latter, and transports them over its road.<sup>1</sup>

Under the terms and operations of a contract, made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities, for the interchange of cars and traffic, between them, which in-

<sup>1</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 59 Fed. Red. 400.

terchange was conducted for many years at the regular, established yard or depot of one of them, and the expense of such interchange was shared by them, in certain proportions fixed by contract. After the passage of the Act to Regulate Commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge—not in the interest of the public, nor of the interstate commerce it handled, but for its own private benefit and advantage; and then sought to compel the company (at whose yard the interchange of traffic had been conducted) to allow such interchange at a new point of connection, and to afford at such point, facilities equal to those which the applicant had voluntarily abandoned, but the court, on the hearing, declared that the application ought not to be granted. The seventh section makes it unlawful for any common carrier, subject to the provisions of the Act, “to enter into any combination, contract, or agreement, express or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination,” etc. It is no violation of said section, for a railroad company to enter into contracts with other companies for the establishment of through routes, and through rates, for the continuous carriage of interstate traffic. Such contracts are in no wise consistent with the things forbidden by said section.<sup>1</sup>

Breaking up a through billing arrangement at through rates, with a responsible company, without any reason therefor, and attempting to give all the business that would come under it to a different company, is unlawful.<sup>2</sup> To refuse altogether to receive traffic from one connecting line; to receive it only under arrangements which impose such obligations upon the shippers as to transfer and rebilling as would make the transaction of the business impracticable in competition with a more favorable line; to receive it without reshipment and transfer indeed, but to systematically neglect to forward it; to receive and forward it, but to so

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

<sup>2</sup> *New York & N. R. Co. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 542.

arrange the hours or manner of delivery as to deprive it of facilities equal to those afforded to traffic coming from the petitioner; these and a great variety of other devices which might be suggested, while differing some in detail, are in substance practically the same. To require petitioner to bring a new proceeding each time the ingenuity of the offending carrier may devise some slight variation of the methods by the means of which its violation of the statute is persisted in, would be to fritter away the system of procedure provided in the statute to secure obedience to its requirements.<sup>1</sup> Where the owners of a coal mine who, pursuant to the authority given them by the state constitution, have connected their mine with the main track of a second railroad, the fact that the manager of the first railroad with which they had made such connection, in the exercise of his discretion, determined that the operation of cars on both side tracks and on a common track leading to the weighing scales at the mine is so unsafe and imprudent as to justify it in disconnecting its track, is not conclusive, but facts must be set up showing in what respect the use by both companies is unsafe.<sup>2</sup>

There is nothing in the Act which makes mere distance between connecting points, whether a furlong, a mile, or ten or twenty, controlling of the question of discrimination in facilities to connecting lines. Where "the physical conditions for interchange of traffic with both the connecting lines are suitable, adequate, and substantially equal," the requirements of the second clause of the third section seem to be plainly applicable.<sup>3</sup> The provisions of the interstate commerce law requiring connecting railroads to receive and deliver passengers and freight from other roads, and afford equal facilities for the interchange of traffic, apply with equal force to their officers and employees.<sup>4</sup>

Neither at common law nor under the Act of Congress of June 15, 1866 (U. S. Rev. Stat. § 5258) or the Interstate Commerce

<sup>1</sup> *New York & N. R. Co. v. New York & N. E. R. Co.* 4 Inters. Com. Rep. 117, 50 Fed. Rep. 867.

<sup>2</sup> *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274.

<sup>3</sup> *New York & N. R. Co. v. New York & N. E. R. Co. supra.*

<sup>4</sup> *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 54 Fed. Rep. 746.

Act of Feb. 4, 1887, can a common carrier be compelled to make through traffic arrangement with connecting lines.<sup>1</sup> The Act to Regulate Commerce does not empower the commission to compel railroad companies to enter into joint arrangements with carriers by water for through carriage at through rates.<sup>2</sup> The Act of Congress in its present form is inadequate to satisfactorily establish a through route with through rates without the co-operation of carriers in arranging for the division of rates and other necessary agreements.<sup>3</sup> In the absence of statutory provision the rights of a railroad company, under a lawful agreement for a specified use of the track of another railroad company, are measured, in respect to the tracks used, by the terms of the contract.<sup>4</sup> An agreement between railroad companies, granting mutual rights to run cars on each other's track, but containing no provision authorizing the assignment or leasing of such rights, confers no such power; and the exercise of such power can be restrained by injunction.<sup>5</sup>

A contract drafted in pursuance of negotiations between two railroad companies, duly signed, sealed, and delivered by the proper officers, agreeing to use their tracks interchangeably, cannot, on the ground that the officers were not authorized to make the contract, be disregarded by one of the companies by which it was adopted and ratified and acted upon in the management of its business, and which received its benefits for more than a year.<sup>6</sup> Though rates in interstate traffic are the subject of agreement among carriers who transport the freight, and for their existence are dependent upon such agreement; and one of the features of such rates usually is that each carrier receiving the freight pays the charges upon it of the carrier delivering it.<sup>7</sup> A refusal to

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

<sup>2</sup> *Re Joint Water & Rail Lines*, 2 Inters. Com. Rep. 486; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. supra*; *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

<sup>3</sup> *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 454; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. supra*.

<sup>4</sup> *Alford v. Chicago, R. I. & P. R. Co.* 2 Inters. Com. Rep. 771.

<sup>5</sup> *Brooklyn Crosstown R. Co. v. Brooklyn City R. Co.* 51 Hun, 600.

<sup>6</sup> *Jourdan v. Long Island R. Co.* 115 N. Y. 380.

<sup>7</sup> *Re Clark*, 2 Inters. Com. Rep. 797.

transport goods unless an excessive charge is paid is not a refusal to afford reasonable facilities, within the meaning of the Act requiring railway and canal companies to afford all reasonable facilities for traffic.<sup>1</sup>

A regulation of a railway company that it will not receive goods that have been damaged while in the hands of other roads, unless it is indemnified against liability for such damage, is reasonable and valid.<sup>2</sup> The transportation by a railroad company to a certain point on its line, of freight received from a connecting carrier which had reserved the right to forward the property by any carrier it might select, especially where the freight thereon was to be paid at the point of destination by the purchaser, is not a service rendered by the party by whom the through shipment is made, but for the connecting carrier; and therefore there may be an unlawful discrimination between the charges for such service and for a shipment by the same shipper to the same consignee at the same destination over the local line alone.<sup>3</sup>

A carrier having an agent at one of its stations, who delivers goods arriving for parties residing there, for the profit of the company, cannot refuse to recognize or act upon the general orders signed by the consignees of the goods, directing the company to hand over to such carrier for delivery all goods which might arrive at that station, addressed to such consignee; nor can they require from such carrier, special orders in each instance, describing the goods or packages demanded; as such action is a violation of the English Railway & Canal Traffic Act (17 & 18 Viet. chap. 31, § 2) being an undue and unreasonable prejudice to the competing carrier in the conduct of his business, and an undue preference and advantage to the company itself.<sup>4</sup> A railway company establishing various offices in different parts of the city, for receiving goods to be transported to its depot, cannot exclude other

<sup>1</sup> *Reg. v. Railway Comrs. & D. I. Co.* L. R. 22 Q. B. Div. 642, 40 Am. & Eng. R. Cas. 59.

<sup>2</sup> *Missouri Pac. R. Co. v. Weisman*, 2 Tex. Civ. App. 86.

<sup>3</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 597.

<sup>4</sup> *Parkinson v. Great Western R. Co.* L. R. 6 C. P. 554.

carriers from access to its depot for the delivery of goods collected by them, during hours when it permits its own vans access.<sup>1</sup>

It may be said it is a matter of common knowledge that the demands and exigencies of commerce require in the transportation of freight, that the cars of one company should be hauled over the road of another, and that, in order to meet this demand, the gauge of the tracks of the great trunk lines has been made uniform. This necessity has been recognized and provided for by statute in many of the states, including Alabama. Section 21 of article 47 of the Constitution, and section 1165 of the Code of 1886, carrying the same into effect, make it mandatory on railroads, when required, to transport or draw over its line the passengers, freight, or cars of any intersecting or connecting road, on reasonable terms, provided such cars are adapted to the gauge of its track, are sufficiently strong, and otherwise in proper condition for safe transportation. So, likewise, it is the duty of a railroad company, under section 1165 of the Code, to receive from a connecting line of railway such cars only as are adapted to the gauge of its track, that are sufficiently strong, and otherwise in proper condition for safe transportation; and when it receives a car on its line from such other company, the presumption is that it meets the above requirements.<sup>2</sup> A statute requiring all railroad companies to receive from any connecting road having the same gauge all cars containing goods or freight consigned to a point on their road does not require a railroad to issue through bills of lading to points beyond its own line, or to deliver its own cars containing freight to a connecting line.<sup>3</sup>

A statute requiring freight in car load lots to be transferred without unloading, unless the unloading is done without charge, and that smaller quantities shall be transferred into the cars of the connecting carrier at cost, which shall be made a part of the joint rate, does not interfere with the constitutional guaranties for the protection of the rights and property of the carriers.<sup>4</sup>

<sup>1</sup> *Re Palmer, L. & S. W. R. Co.* 1 Nev. & McN. 271, L. R. 6 C. P. 194.

<sup>2</sup> *Louisville & N. R. Co. v. Boland*, 18 L. R. A. 260, 96 Ala. 626.

<sup>3</sup> *Coles v. Centrl R. & Bkg. Co.* 86 Ga. 251, 45 Am. & Eng. R. Cas. 328.

<sup>4</sup> *Burlington, C. R. & N. R. Co. v. Dey*, 12 L. R. A. 436, 82 Iowa, 312.



The provision of the charter of the Northern Pacific Railroad Company, that it shall permit any other railroad company to form running connections with it, imposes no obligation upon it to run the cars of another company over its road, except when the transfer of the freight contained therein would injure it. The "running connections" include only such arrangements as to the time of trains and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience.<sup>1</sup> It does not require it to permit the use of its road by the cars of other companies, or to honor tickets of such other companies.<sup>2</sup> A railway company has no right under the Florida laws to lease the terminal point of its track and terminal facility on a navigable stream to a steamboat company in such manner as to defeat the ingress and egress to and from its track by other competing lines of steamboat companies.<sup>3</sup>

Under the constitution of Colorado one railroad company has not a constitutional right, which a court of chancery can enforce by a decree for a specific performance, to form the same business connection, and make the same traffic arrangement, with another company as that company grants to or makes with any competing company operating a connected road. The right of one company to connect its road with that of another company, which is made part of the fundamental law, implies no more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. It does not include the right of business intercourse between the two companies.<sup>4</sup> But a railroad company may be compelled to offer the same facilities for interchange of cars and freight in bulk with one connecting road that it does with another. The Interstate Commerce Act prohibits discrimination. What are reasonable facilities for an

<sup>1</sup> *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. Rep. 465, 51 Am. & Eng. R. Cas. 145.

<sup>2</sup> *Oregon Short-Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. App. 9th C.) 61 Fed. Rep. 158.

<sup>3</sup> *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387, 49 Am. & Eng. R. Cas. 212.

<sup>4</sup> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291.

interchange of business between connecting railroad companies, within the requirements of the Interstate Commerce Act, depends upon the state of the traffic and the business, and the question is to be determined by what is considered reasonable by the public, and what is required to conveniently transact the business. The intervention between two railroads of a terminal system owned by an independent company will not prevent the roads from being connecting lines within the meaning of the Interstate Commerce Act requiring such lines to interchange business; at least where the stock of the terminal company is owned by the two roads jointly, or by one of them in such a manner that the terminal in reality forms a part of its road.

A railroad company can require a connecting company to receive through cars and take freight in them over its line without transfer, although the use of the latter's terminals and terminal facilities will necessarily be required for the service, and although the roads are parallel and rival lines and the service of transporting the freight has been practically performed by one company, which needs the assistance of its rival simply to deliver the freight at points near the terminus of its road; for this purpose no contract between the companies is necessary. The connecting company may be required to receive passengers under similar circumstances. One railroad company may have a right to issue bills of lading for freight and through tickets for passengers over a connecting road, although there is no contract between the companies.<sup>1</sup>

It has been ruled that no obligation to transport freight over its line in the cars of another company, when it has cars of its own not in use, to pay the charges thereon of the other company, or to honor tickets for passage over its line issued by the other company, is imposed upon a railroad company by the Interstate Commerce Act, § 3, providing that carriers shall give no undue or unreasonable preference, and shall afford all reasonable, proper and equal facilities for the interchange of traffic. It is not, as a carrier of freight and passengers, under any obligation to take

<sup>1</sup> *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 205.

freight from a connecting road in the cars of the latter and transport it in such cars while its own cars are not in use, in the absence of any controlling custom among railroads. The refusal by a railroad company to transport freight on foreign cars originating east of a certain meridian, when its own cars are not in use but are free to be employed in the transportation desired, or where a transfer of freight will not be injurious to it, is not an unreasonable discrimination against another railroad company, or a denial to it of reasonable and proper facilities under the Interstate Commerce Act, although it accepts in such cars freights originating west of such meridian.<sup>1</sup> If it accepts freight in the cars of a connecting road and transports it therein when it has cars of its own not in use, it is not liable for mileage upon such cars in the absence of an arrangement to that effect; but the existing custom that when a railroad takes the freight in the foreign cars because it has none of its own out to use, or because the freight would be injured by the transfer, it shall pay certain mileage on the cars used, is reasonable and will be enforced.<sup>2</sup> A railroad company is not liable for the loss by fire of a car received by it from another company, while it is standing on its side track at its destination to be unloaded by the consignee, although by its contract it is to transport it to its yard when unloaded.<sup>3</sup>

A bridge company which is not, either in law or in fact, a common carrier of interstate traffic, cannot invoke the provisions of the Act to Regulate Commerce to compel railway companies to transact business with or through such bridge company. Its franchise does not constitute it a common carrier, nor confer on it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars

<sup>1</sup> *Oregon Short-Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. App. 9th C.) 61 Fed. Rep. 158.

<sup>2</sup> *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. Rep. 465, 51 Am. & Eng. R. Cas. 145.

<sup>3</sup> *Peoria & P. U. R. Co. v. United States Rolling Stock Co.* 136 Ill. 643, revising 36 Ill. App. 552.

and trains, it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being as to all freight transported by it over the bridge.<sup>1</sup>

Burton Stock Car Company, which furnishes stock cars to shippers over railroad, does not exchange with or use cars belonging to others, and is not a connecting line entitled to equal facilities for interchange of traffic under sec. 3, par. 2, of the Act. Such company is not unjustly discriminated against by refusal of railroad companies to pay same rate of mileage for its cars as for ordinary freight cars. Customary mileage rate for freight cars of other railway companies used upon paying company's line, and which payment is, by interchange of cars, practically equalized among different roads, is not the measure of payment for the use of cars belonging to other persons than railroad companies.<sup>2</sup>

### § 105. *Provisions Enforcing Connections and Forbidding Combinations.*

The following are the constitutional and statutory provisions affecting connections for business and prohibiting combinations between railroads to prevent compensation. Alabama constitution requires roads to connect, receive and transport each other's freight and passengers.<sup>3</sup> The meaning of the last clause of article 15, section 4, of the Constitution of Colorado, which provides that "every railroad company shall have the right with its road . . . to connect with . . . any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate *termini*.<sup>4</sup> Under the constitution of Colorado one railroad company has not a constitutional right, which a court of chancery

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567.

<sup>2</sup> *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329.

<sup>3</sup> See also, Code of 1886, vol. I. p. 389, § 1586; Arizona. Rev. Stat. 1887, § 318, p. 113; Arkansas. Const. 1874, art. 17, § 4; Act March 24, 1887, § 2; Laws, p. 114; Colorado. Const. 1876, art. 15, § 5; Rev. Stat. 1883, § 353, p. 211; Rev. Stat. 1883, § 360, p. 213.

<sup>4</sup> *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 13 Fed. Rep. 546.

can enforce by a decree for a specific performance, to form the same business connection, and make the same traffic arrangement, with another company as that company grants to or makes with any competing company operating a connected road. The right of one company to connect its road with that of another company, which is made part of the fundamental law, implies no more than a mechanical union of the tracks of the roads so as to admit of the convenient passage of cars from one to the other. It does not include the right of business intercourse between the two companies.<sup>1</sup>

Where two railway companies agree that they shall accept no freight for certain places, except to be carried over the road of the other, it is a conspiracy to grasp commerce, and suppress the building of railroads within such locality. A contract of this kind is against public policy, and therefore void. A contract by which one railroad company agrees with another upon a division of territory and traffic between them, and that one will not "do any through business to and from New Mexico *via* Trinidad or El Moro," amounts to an express renunciation of a duty of transportation enjoined by the state, and is therefore void.<sup>2</sup> Where a railroad corporation is about to purchase controlling interest in the stock of a rival railroad, the sale being invalid should be restrained.<sup>3</sup> Under the Act of February 12, 1885, all railroad companies have power to make contracts and arrangements with each other for leasing or running their respective roads, or any

<sup>1</sup> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291.

<sup>2</sup> *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650, 4 McCrary, 325, 16 Cent. L. J. 209, reversed on another point in 110 U. S. 667, 28 L. ed. 291; Connecticut. Act April 17, 1883, § 1; Laws, p. 267. See *State v. Hartford & N. H. R. Co.* 29 Conn. 539; Gen. Laws 1888, 1889 requires mutual connection and transportation of passengers and freight; Dakota. Civil Code 1883, § 473, 1, p. 830; Florida. Act June 7, 1887, § 1; June 7, 1889, same requirement. Georgia. Const. 1877, art. 4, § 2, ¶ 4; Act of Sept. 27, 1881, § 15; Laws, p. 165; 1882, 1883, same provision.

<sup>3</sup> *Central R. Co. v. Collins*, 40 Ga. 582; *Havemeyer v. Havemeyer*, 11 Jones & S. 506, 515; *Central R. & Bkg. Co. v. State*, 54 Ga. 401, followed in *Savannah, G. & N. A. R. Co. v. State*, 55 Ga. 557; Idaho. Rev. Stat. 1887, authorize connection of roads. Acts consolidating the Central Railroad & Banking Company with the Macon & Western Railroad Company construed.

part thereof; and a plea to an information, in the nature of a *quo warranto*, charging one company with usurping the powers and franchises granted to another, which sets up a contract between it and the other company authorizing it to operate the road of such other company, and that it is operating the road under such contract, is a good plea.<sup>1</sup>

Where, under the Illinois state constitution, private persons, such as the owners of mines, are entitled to a side track connecting with the main track of a railroad, and such a side track has been constructed, the fact that the owners of the mine subsequently caused another side track over their own property to be constructed in connection with the main track of another company, in such a manner as in no way to interfere with the cars of the first company, will not justify that company in disconnecting its switch and refusing further accommodation to the mine owners.<sup>2</sup> There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute nor against the public policy of the state, is valid.<sup>3</sup> Where several insurance companies equalize rates of insurance in a large city, and agree not to insure otherwise under penalty, the agreement is void.<sup>4</sup> The power to declare contracts void as against public policy should only be exercised in cases that are free from doubt.<sup>5</sup>

Where the charter of a railroad company provided "that any and all such railroad, or railroads, hereafter constructed, may connect and join with the road, hereby contemplated," the connection thus authorized is a physical, and not a business connection,

<sup>1</sup> Illinois. Const. 1870, art. 11, § 11; *Illinois M. R. Co. v. People*, 84 Ill. 426; Rev. Stat. 1887, provides for connection of roads.

<sup>2</sup> *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274.

<sup>3</sup> Indiana. Rev. Stat. 1888, § 3951; *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.* 8 Biss. 456.

<sup>4</sup> *Metzger v. Cleveland*, 3 Ind. Law Mag. 42 (1883). Code 1881 authorizes connection of roads.

<sup>5</sup> Iowa Rev. Code 1884, § 1297, p. 341; *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 191; Act of April 15, 1888, requires each road to exchange and forward cars, etc. Act of April 8, 1890, requires through tariff for freight and cars. Kansas. Comp. Laws 1885, p. 778, § 5221; p. 779, § 5222.

and it does not require an interchange of traffic at the point of junction.<sup>1</sup>

By virtue of Special Laws 1870, chap. 57, § 4, and Special Laws 1871, chap. 71, § 1, the Minneapolis Railroad Company has authority to make a valid lease to another company of this state of rights which it has acquired since the passage of said chapter 71, by condemnation of land.<sup>2</sup> Roads must exchange and forward traffic. *Currier v. Concord R. Corp.* 48 N. H. 321, says: "The object of the law is to prevent the consolidation of rival and competing lines of railroad by contracts or arrangements between them, by means of which competition is removed; the purpose being to prevent the increase of the charges of such railroads beyond what might be expected under the influence of a free competition."<sup>3</sup> The Act providing for the consolidation of railroads does not give by implication the power to lease.<sup>4</sup> Whether a provision in the charter of a railroad company authorizing it to lease or consolidate with any other railroad, and authorizing any company to take such lease and operate the same, would be sufficient to confer such authority upon any railroad of the state, does not arise in a pending case, where the title of the Act incorporating the railroad company does not indicate such subject, and such provision of its charter is therefore void.<sup>5</sup> Under

<sup>1</sup> Kentucky. *Kentucky & I. Bridge Co. v. Louisville & N. A. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567; Louisiana. Constitution requires connection and forwarding of traffic; Maine. Rev. Stat. 1883, chap. 51, p. 480, § 54; Rev. Stat. to 1889 requires forwarding of traffic; Minnesota. March 7, 1887, same requirement; Maryland. Rev. Code, 1878, p. 359; Michigan. Const. 1850, art. 19a, § 2; How. Ann. Stat. 1882, p. 854, § 3343. Michigan Session Laws, 1873, as amended 1877, 1883, require transportation of cars and traffic of connecting roads. Minnesota Gen. Stat. 1878, p. 381; Act March 3, 1881, § 3; Laws, p. 110.

<sup>2</sup> *Pence v. St. Paul, M. & M. R. Co.* 28 Minn. 488; Missouri. Const. 1875, art. 12, §§ 17, 18; Act March 30, 1887, § 1; Laws, p. 102; Id. § 2; see *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389, 39 Am. Dec. 519, 5 Mo. App. 347; Nebraska. Const. 1875, art. 11, § 3; Laws, 1887, chap. 60, § 5, p. 543, requires interchange of traffic but not joint use of road; New Hampshire. Gen. Laws, 1878, p. 377, require facilities for interchange of traffic.

<sup>3</sup> *Greenhood, Public Policy*, 663-673; New Jersey. Act 1880; P. L. 1880, 231, authorizing railroads to lease roads, etc., simply confers a right to exercise the power given after consent of those affected thereby or payment of satisfactory compensation.

<sup>4</sup> *Mills v. Central R. Co. of N. J.* 41 N. J. Eq. 1.

<sup>5</sup> See *Camden & A. R. Co. v. Mays Landing & E. H. C. R. Co.* 48 N. J. L.

the statutes of New York railway lines cannot be consolidated unless they are substantially continuous lines, or running in the same general direction.<sup>1</sup> Where proprietors of five lines of boats, engaged in the transportation of persons and freight, combine, and stipulate that they all shall charge certain prices, the net earnings of all to be divided according to certain fixed proportions, the agreement is invalid.<sup>2</sup> The proprietors of all boats on the Erie and Oswego canals entered into an agreement to establish a uniform scale of prices of freight and passage, and to divide the profits arising therefrom proportionately, according to the number of boats employed, with a provision preventing the members from engaging in similar business outside of the combination. The contract was declared illegal.<sup>3</sup>

Section 168 of the Penal Code New York makes it a misdemeanor for two or more persons to conspire (subd. 6) "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws." The Revised Statutes contained a similar provision.<sup>4</sup> In *People v. Sheldon*, 22 L. R. A. 221, 139 N. Y. 251, the fact that the defendants subscribed the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and

530. New York Laws of 1847, chap. 222, require equal facilities to be granted to all competing or connecting roads in traffic and for transportation of cars, passengers and freight. Rev. Stat. 1882, p. 1592.

<sup>1</sup> 2 Rev. Stat. (7th ed.) 1590; *People v. Boston, H. T. & W. R. Co.* 12 Abb. N. C. 230.

<sup>2</sup> *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258.

<sup>3</sup> *Stanton v. Allen*, 5 Denio, 434, 435, 49 Am. Dec. 282; *Transportation Cases*, Whart. Prec. No. 658.

<sup>4</sup> 2 Rev. Stat. p. 692, § 8, subd. 6.



that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the appeal.

The court decided that if the confederacy into which the defendants entered was an act "injurious to trade or commerce," irrespective of its results in the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid

according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, Ch. J. (Lord Macclesfield), in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad.<sup>1</sup> But if the circumstances are set forth that presumption is excluded and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction, and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it.

Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, Was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon,

<sup>1</sup> But see *United States v. Trans-Missouri Freight Asso.* 24 L. R. A. 73, 58 Fed. Rep. 58.

and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case, in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition.<sup>1</sup>

<sup>1</sup> See also *People v. Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. The principle upon which the case was submitted to the jury is sanctioned by the decisions in New York, and the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

The trial judge was requested by the defendants' counsel, in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement.<sup>1</sup> In New York state

<sup>1</sup> 3 Chitty, Crim. Law, 1142; *O'Connell v. Reg.* 11 Clark & F. 155.

this rule of the common law was changed by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement."<sup>1</sup> And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer, unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object.

A contract by the owners of a railroad to be made, under an act of incorporation, with the owners of a rival railroad, not to continue such road beyond a certain point, is void as contravening public policy.<sup>2</sup> The acquisition of lands to prevent interference of competing lines, or for purposes of speculation, cannot be consummated under the statutes authorizing the taking of private property for public use.<sup>3</sup> Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities.<sup>4</sup> A contract made by a corporation in violation of the terms of its charter, is *ultra vires*, and void as against public policy.<sup>5</sup> A rail-

<sup>1</sup> 2 Rev. Stat. p. 692, § 10.

<sup>2</sup> *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411.

<sup>3</sup> *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137.

<sup>4</sup> *Hartford & N. H. R. Co. v. New York & N. H. R. Co. supra.* See *People v. Boston & A. R. Co.* 70 N. Y. 569, 570; *Chicago etc. R. Co. v. Atty. Gen.* 9 West Jur. 347 (1875).

<sup>5</sup> *Union Bridge Co. v. Troy & L. R. Co.* 7 Lans. 240.

way company cannot transfer or lease its line unless authorized by statute.<sup>1</sup> By chapter 444 of 1859, the Long Island Railroad Company was authorized to take a lease of any railroad that might be connected therewith. It was held that under this provision of the statute, a lease might be taken of a competing road, provided that, when united, the two roads were capable of forming continuous lines.<sup>2</sup> The manner of procedure against a consolidated corporation was determined in *Prouty v. Lake Shore & M. S. R. Co.* 6 Hun, 246, 64 N. Y. 641.

An agreement by a steamship corporation to buy out a competing line which, in consideration of a monthly payment, agrees to discontinue running vessels between ports mentioned, and not to charter or sell its vessels for use on that route, and not to become in any way interested in the running of steamships between those places, is not void as in restraint of trade.<sup>3</sup> An agreement between plaintiff and defendant, each being a railroad company, that plaintiff would at all times deliver to defendant for transportation all the freight and passengers that it could lawfully control or influence, and that it would use its influence to promote the interests and business of defendant company as far as it could properly; that defendant would use its influence and exercise its control to promote plaintiff's interest; that it would make good any deficiencies of plaintiff to meet the interest upon its present bonded indebtedness; that plaintiff should cause to be deposited with defendant a majority of its capital stock; and that, so long as the management of the plaintiff company should be satisfactory to defendant, the latter would give to the representative of plaintiff the right to vote upon the stock so deposited,—is not *per se* void on the ground that it is contrary to

<sup>1</sup> *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Hinckley v. Gildersleeve*, 19 Grant, Ch. 212. See also *Atty. Gen. v. Niagara Falls International Bridge Co.* 20 Grant, Ch. 34; *Pittsburg & C. R. Co. v. Bulford & B. R. Co.* 81\* Pa. 104; *Woodruff v. Erie R. Co.* 25 Hun, 246; *Abbott v. Johnstown G. & K. Horse R. Co.* 89 N. Y. 27, 36 Am. Rep. 572; *Archer v. Terre Haute & I. R. Co.* 102 Ill. 493.

<sup>2</sup> *Wallace v. Long Island R. Co.* 12 Hun, 460.

<sup>3</sup> *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

public policy.<sup>1</sup> The North Carolina Railroad Company is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof.<sup>2</sup> The lines of two railway companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Revised Statutes, § 3379 of Kansas; and hence such companies cannot become consolidated into one corporation under that section.<sup>3</sup>

The Lateral Railroad Act is constitutional.<sup>4</sup> The Act of March 29, 1840, is a supplement to the Act of May 5, 1832, is *in pari materia* with it, and should be so construed; and neither Act authorizes the connection of a lateral road, except with a public improvement. Two railway companies owning lines of railroad connected only by other railroads which such companies hold by lease are not authorized to become consolidated into one corporation under Pennsylvania Revised Statutes, § 3379.<sup>5</sup> The lease of a railway is held invalid in *Kersey Oil Co. v. Oil Creek & A. R. Co.* 12 Phila. 374. Where a corporation authorized to make purchases and sales of and investments in the bonds and securities of other corporations, contracted for the purchase of a controlling interest in the stock and securities of a projected line of railroad, and the consideration coming from another railroad company; the projected railroad having a traffic contract with such other railroad company, by which the former, when completed, would be a parallel or competing line with it, the corporation in whose name the contract of purchase was made not owning a parallel

<sup>1</sup> *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 42 Hun, 496. New Mexico, Act of Feb. 12, 1890, requires connection for transferring cars and traffic.

<sup>2</sup> *State v. Richmond & D. R. Co.* 72 N. C. 634, 73 N. C. 527, 21 Am. Rep. 473. North Dakota Act of May 12 and March 19, 1890, requires connection of roads on petition of twenty freeholders and interchange of traffic.

<sup>3</sup> *State v. Vanderbilt*, 37 Ohio St. 590; Ohio. Rev. Stat. 1884, p. 674, § 3300; Act of April 22, 1885; Laws, p. 150; Rev. Stat. 1890, requires connection of crossing roads so as to transfer cars; Pennsylvania. Const. 1873, art. 17, § 4, authorizes connection of road and requires interchange of traffic.

<sup>4</sup> *Harvey v. Lloyd*, 3 Pa. 331; *Shoenberger v. Mulhollan*, 8 Pa. 134; *Hays v. Risher*, 32 Pa. 169.

<sup>5</sup> *Keeling v. Griffin*, 56 Pa. 305.

or competing line,—transfer of the property, or any of it, will be enjoined as coming within Pennsylvania Constitution, art. 17, § 4, which prohibits any railroad from acquiring or consolidating with a parallel or competing railroad.<sup>1</sup> A preliminary injunction was granted to restrain the withdrawal of railway connection with an old established stock-yard, the withdrawal being attempted to aid in the erection of a monopoly at another point.<sup>2</sup>

Such combinations are illegal at common law, because contrary to public policy. Agreements for such combinations and promises founded thereon will not be enforced,<sup>3</sup> and the carrying out of the combinations will be enjoined.<sup>4</sup> Unless specially authorized by statute to lease its road, a railroad cannot, by so doing, defeat its obligations to the public, or escape the liability which the law imposes for torts, although committed by its lessee.<sup>5</sup> Where several common carriers combine as an association, the object of which is to reduce competition between them, and to provide a uniform charge for carriage, and fix upon such a rate, each member to pay a fine for carrying freight for less than the same, the agreement is void, and the association cannot recover the fine.<sup>6</sup> An agreement between competing railway companies

<sup>1</sup> *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495, 501; South Carolina. Gen. Stat. 1882, §§ 1471-1474, requires equal facilities to be given to all connecting roads; South Dakota. Const. art. 17, authorizes connection of roads and requires interchange of traffic.

<sup>2</sup> *Tennessee. Coe v. Louisville & N. R. Co.* 3 Fed. Rep. 775; Texas. Const. 1876, art. 10, §§ 5, 6; Civil Stat. 1888, vol. 2, p. 442, art. 42, 46; Act March 28, 1887; Laws, p. 329; Act of April 2, 1887, chap. 123, §§ 4251-4254 (S. B. No. 115) requires interchange on equal terms of all traffic and express business; West Virginia. Const. 1872, art. 11, § 11; Code 1887, p. 521; Act of 1875, chap. 82, requires intersecting roads to receive and forward traffic on equal terms; Virginia. Code, 1887, § 1208, carrier must afford reasonable facilities and forward cars, boats, etc.; Vermont. R. L. 1880, roads must connect and must afford equal facilities; Wisconsin. (Rev. Stat. 1878, p. 536, § 1833).

<sup>3</sup> *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613; *Morgan v. Donovan*, 58 Ala. 241; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *State v. Hartford & N. H. R. Co.* 29 Conn. 538.

<sup>4</sup> *Central R. Co. v. Collins*, 40 Ga. 582; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5.

<sup>5</sup> *Lakin v. Willamette Valley & C. R. Co.* 13 Or. 436, 57 Am. Rep. 25; *Balsley v. St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784.

<sup>6</sup> *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613.



for the purpose of fixing reasonable freight rates and preventing ruinous competition is not invalid under the Act of Congress of July 2, 1890, prohibiting contracts in restraint of trade or commerce, nor as amounting to a transfer of franchises and corporate powers of the companies.<sup>1</sup>

A railroad company without statutory authority cannot guarantee the covenants of another company in the lease of a railroad, merely because of an anticipated increase of its own business in consequence of such lease.<sup>2</sup> The charter of a railroad company is—outside the limits of the rule against impairing the obligation of contracts—subject to the Constitution, statutes and public policy of the state by which the corporation was created. If the constitution, statutes or public policy of the state forbid the company from entering into combinations to prevent competition, the act of the company in entering into such a combination is *ultra vires* even though the combinations involve interstate traffic; and the state courts have jurisdiction to enjoin the act or to forfeit the charter of the company therefor.<sup>3</sup>

In a recent decision by the United States Court of Appeals, Eighth Circuit,<sup>4</sup> on an appeal by the plaintiff from a decree of the Circuit Court of the United States for the District of Kansas, in favor of the defendants, in a proceeding to dissolve the Trans-Missouri Freight Association, on the ground that it had violated

<sup>1</sup> *United States v. Trans-Missouri Freight Asso.* 53 Fed. Rep. 440.

<sup>2</sup> *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83.

<sup>3</sup> *Tippecanoe County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 85 (competitive traffic between Lafayette, Ind., and points in Ill.); *State v. Vanderbilt*, 37 Ohio St. 590 (competitive traffic between Cincinnati, Ohio, and points outside Ohio reached through ports on Lake Erie); *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495 (competitive traffic between Pittsburg and points reached through New York city); *State v. Atchison & N. R. Co.* 24 Neb. 143, 32 Am. & Eng. R. Cas. 388 (competitive traffic between Lincoln, Neb., and points in Kansas); *Thouron v. East Tennessee, V. & G. R. Co.* 90 Tenn. 609, 5 Ry. & Corp. L. J. 77 (competitive traffic between points in Tennessee and points in adjoining states). See also *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411 (competitive traffic between New Hampshire, Connecticut, and points in Massachusetts); *Morgan v. Donovan*, 58 Ala. 241 (competitive traffic between Mobile, Ala., and New Orleans, La.); as to foreign commerce, see *Murray v. Vanderbilt*, 39 Barb. 141.

<sup>4</sup> *United States v. Trans-Missouri Freight Association*, 24 L. R. A. 73, 58 Fed. Rep. 58.

the United States Anti-Trust Act, the decision of the circuit court was sustained, and the rule was announced that an association of railroad companies for mutual protection by establishing and maintaining reasonable rates, rules and regulations is not illegal as a restraint of trade, under the Anti-Trust Act of Congress, merely because it incidentally tends to restrict competition in some degree, where each member of the association must still compete with other members for business, and while regular monthly meetings are provided for at which action may be taken, five days' notice of any proposed reduction of rates or change of rules must be given, and members are bound by the decision of the association, unless they give written notice in ten days thereafter to the contrary, and any member may withdraw on thirty days' notice. That an association of railroad companies cannot be held to create a monopoly, within the meaning of the Anti-Trust Act of Congress, where it is not intended to have any trade of its own, but to be a mere adviser of its members, who are competitors of each other. And that a contract between railroad companies is not necessarily "in restraint of trade" and illegal, within the meaning of the Anti-Trust Act of Congress, because it in some manner imposes a restriction upon competition.

The facts are as follows :

The bill alleges that the defendant railroad companies were corporations and common carriers, and that they owned independent and competing lines of railroad in that part of the United States west of the Mississippi and Missouri rivers ; that they were engaged in transporting freight among the states and to and from foreign nations, and that they had been encouraged to construct and maintain these competing lines of railroad independent of each other by subsidies and grants of lands from the United States and the people of the states and territories west of these great rivers. The bill then alleges that, not being content with the rates of freight they were receiving, intending oppressively to augment those rates, to counteract the effect of free competition upon them, to establish and maintain arbitrary rates, and to procure large sums of money from the people of those states and territories engaged in interstate commerce, they en-

tered into an agreement on March 15, 1889, which, as subsequently modified, reads thus:

“Memorandum of agreement, made and entered into this fifteenth day of March, 1889, by and between the following railroad companies, viz: Atchison, Topeka & Santa Fé Railroad, Chicago, Rock Island & Pacific Railway, Chicago, St. Paul, Minneapolis & Omaha Railway, Burlington & Missouri River Railroad in Nebraska, Denver & Rio Grande Railroad, Denver & Rio Grande Western Railway, Fremont, Elkhorn & Missouri Valley Railroad, Kansas City, Ft. Scott & Memphis Railroad, Kansas City, St. Joseph & Council Bluffs Railroad, Missouri Pacific Railway, Sioux City & Pacific Railroad, St. Joseph & Grand Island Railroad, St. Louis & San Francisco Railway, Union Pacific Railway, Utah Central Railway, and such other companies as may hereafter become parties hereto. Witnesseth, for the purpose of mutual protection, by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic, both through and local, the subscribers do hereby form an association, to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions:

#### “ARTICLE I.

“The traffic to be included in the Trans-Missouri Freight Association shall be as follows:

“1. All traffic competitive between any two or more members hereof passing between points in the following described territory, commencing at the Gulf of Mexico, on the 95th meridian; thence north to the Red river; thence *via* that river to the eastern boundary line of the Indian territory; thence north by said boundary line and the eastern line of the state of Kansas to the Missouri river, at Kansas City; thence *via* the said Missouri river to the point of intersection of that river with the eastern boundary of Montana; thence *via* the said eastern boundary line to the international line,—the foregoing to be known as the ‘Missouri River Line;’ thence *via* said international line to the Pacific coast; thence *via* the Pacific coast to the international line between the United States and Mexico; thence *via* said interna-

tional line to the Gulf of Mexico, and thence *via* said Gulf to the point of beginning, including business between points on the boundary line as described.

“2. All freight traffic originating within the territory as defined in the first section when destined to points east of the aforesaid Missouri river line.

#### “EXCEPTIONS.

“(a) The D. & R. G. and the D. & R. G. W., except their business to and from points in Colorado west of the D. & R. G. line between Denver and Trinidad; also business *via* their lines between points in Colorado and points in Utah.

“All local business between Denver and Trinidad and intermediate points; all local business of the A. T. & S. F. between Pueblo and Canon City, Colo.; all stone traffic having both origin and destination within the state of Colorado.

“The jurisdiction of this association, in so far as the business of the Denver & Rio Grande and the Denver & Rio Grande Western railway companies is concerned, covers the following traffic, namely:

“All freight traffic to, from, or through all common or junction points in the states of Nebraska and Kansas and the Indian territory, originating at or destined to Denver, Colorado Springs, Pueblo, or Trinidad.

“All freight traffic between Ogden, Spanish Fork, and intermediate points on the one hand, and to, from, or through points in Kansas or Nebraska upon or east of the 103d meridian, on the other hand.

“Traffic which may be excluded under the application of the above is only such as may be delivered to or received from the Denver & Rio Grande Railroad and Denver & Rio Grande Western Railway.

“(b) Traffic included in the Trans-Continental & International Association.

“(c) Traffic passing between points in Kansas or Nebraska and Mississippi river points, Carondelet and south; also traffic passing between points in Kansas or Nebraska and points in the southern

states east of the Mississippi river and south of the south line of Kentucky and Virginia, regardless of the route by which the business crosses the Mississippi or Ohio rivers.

“(d) Traffic passing between Missouri river points and points in the territory east of said river.

“(e) All traffic to points on the Northern Pacific and Manitoba railways.

“(f) Traffic to points in Arkansas.

“(g) Coal, stone and gravel from Colorado, Wyoming and Dakota, to points in Kansas and Nebraska, and to Sioux City, Council Bluffs, or Pacific Junction, Iowa, St. Joseph, Kansas City, or Boswell, Mo.

“(h) The interchange of traffic with the Colorado Midland and South Park Companies, to or from Aspen, Colorado, Glenwood Springs, Colorado, and intermediate points, including coal branches therefrom, and Buena Vista, Colorado, and Leadville, Colorado.

“(i) Business to and from Florence, Colorado, by all lines.

## “ARTICLE II.

“Sec. 1. The association shall, by unanimous vote, elect a chairman of the organization. The chairman may be removed by a two thirds vote of the members.

“Sec. 2. There shall be regular meetings of the association at Kansas City, unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together, which notice shall be given not less than four days before the day set for the meeting. When a meeting, regular or special, is convened, it shall be incumbent upon each party hereto to be represented by some officer authorized to act definitely upon any and all questions to be considered. Each road shall designate to the chairman one person who shall be held personally responsible for rates on that road. Such person shall be present at all regular meetings when possible, and shall represent his road, unless a superior officer is present. If unable to attend, he shall send a substitute, with written authority to act upon all questions

which may arise, and the vote of such substitute shall be binding upon the company he represents.

“Sec. 3. A committee shall be appointed to establish rates, rules, and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order; but if they differ the question at issue shall be referred to the managers of the lines parties hereto, and if they disagree it shall be arbitrated in the manner provided in article 7.

“Sec. 4. At least five days’ written notice prior to each monthly meeting shall be given the chairman of any proposed reduction in rates, or change in any rule or regulation governing freight traffic; eight days in so far as applicable to the traffic of Colorado or Utah.

“Sec. 5. At each monthly meeting the association shall consider and vote upon all changes proposed of which due notice has been given, and all parties shall be bound by the decision of the association so expressed, unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification, notwithstanding the vote of the association; provided, that, if the member giving notice of the change shall fail to be represented at the meeting, no action shall be taken on its notice, and the same shall be considered withdrawn. Should any member insist upon a reduction of rate against the views of the majority, or if the majority favor the same, and if, in the judgment of said majority, the rate so made affects seriously the rates upon other traffic, then the association may, by a majority vote upon such other traffic, put into effect corresponding rates, to take effect upon the same day. By unanimous consent any rate, rule, or regulation relating to freight traffic may be modified at any meeting of the association without previous notice.

“Sec. 6. Notwithstanding anything in this article contained, each member may, at its peril, make at any time, without previous notice, such rate, rule, or regulation as may be necessary to meet the competition of lines not members of the association, giving at

the same time notice to the chairman of its action in the premises. If the chairman upon investigation shall decide that such rate is not necessary to meet the direct competition of lines not members of the association, and shall so notify the road making the rate, it shall immediately withdraw such rate. At the next meeting of the association held after the making of such rate it shall be reported to the association, and, if the association shall decide by a two thirds vote that such rate was not made in good faith to meet such competition, the member offending shall be subject to the penalty provided in section 8 of this article. If the association shall decide by a two thirds vote that such rate was made in good faith to meet such competition, it shall be considered as authority for the rate so made.

“Sec. 7. All arrangements with connecting lines for the division of through rates relating to traffic covered by this agreement shall be made by authority of the association: provided, however, that when one road has a proprietary interest in another the divisions between such roads shall be what they may elect, and shall not be the property of the association: provided, further, that, as regards traffic contracts at this date actually existing between lines not having common proprietary interests, the same shall be reported, so far as divisions are concerned, to the association, to the end that divisions with competing lines may, if thought advisable by them, be made on equally favorable terms.

“Sec. 8. It shall be the duty of the chairman to investigate all apparent violations of the agreement, and to report his findings to the managers, who shall determine by a majority vote (the member against whom complaint is made to have no vote) what, if any, penalty shall be assessed, the amount of each fine, not to exceed one hundred dollars, to be paid to the association. If any line party hereto agrees with a shipper, or any one else, to secure a reduction or change in rates, or change in the rules or regulations, and it is shown upon investigation by the chairman that such an arrangement was effected, and traffic thereby secured, such action shall be reported to the managers, who shall determine, as above provided, what, if any, penalty shall be assessed.

“Sec. 9. When a penalty shall have been declared against any

member of this association, the chairman shall notify the managing officer of said company that such fine has been assessed, and that within ten days thereafter he will draw for the amount of the fine; and the draft, when presented, shall be honored by the company thus assessed.

“Sec. 10. All fines collected to be used to defray the expenses of the association, the offending party not to be benefited by the amounts it may pay as fines.

“Sec. 11. Any member not present or fully represented at roll call of general or special meetings of the freight association, of which due and proper notice has been given, shall be fined one dollar, to be assessed against his company, unless he shall have previously filed with the chairman notice of inability to be present or represented.

### “ARTICLE III.

“The duties and powers of the chairman shall be as follows:

“Section 1. He shall preside at all meetings of the association and make and keep a record thereof, and promulgate such of said proceedings as may be necessary to inform the parties hereto of the action taken by the association.

“Sec. 2. He shall at all times keep and publish for the use of the members a full record of the rates, rules, and regulations prevailing on all lines parties thereto on business covered by this agreement, and each of the parties thereto agrees to furnish such number of copies of the rates, rules, and regulations issued by it as the chairman may require.

“Sec. 3. He shall construe this agreement and all resolutions adopted thereunder, his construction to be binding until changed by a majority vote of the association.

“Sec. 4. He shall publish in joint form all rates, rules, or regulations which are general in their character and apply throughout the territory of the association, and shall also publish in the manner above such rates, rules, or regulations applying on traffic common to two or more lines as may be agreed upon by the lines in interest.

“Sec. 5. He shall be furnished with copies of all waybills for



freight carried under this agreement when called for, and shall furnish such statistics as may be necessary to give members general information as to the traffic moved, subject to the provisions of the Interstate Commerce Railway Association agreement as to lines members thereof.

"Sec. 6. He shall render to each member of the association monthly statements of the expenses of the association, showing the proportions due from each, and shall make drafts on members for the different amounts thus shown to be due.

"Sec. 7. He shall hear and determine all charges of violations of this agreement, and assess, collect, and dispose of the fines for such violations as provided for herein.

"Sec. 8. The chairman shall be empowered to authorize lines in the association to meet the rates of another line or other lines in the association when in his judgment such action is justified by the circumstances; this, however, not to act in any way as an indorsement of an unauthorized rate made by any member.

"Sec. 9. Only parties interested shall vote upon questions arising under the agreement, and in case of doubt the chairman shall decide as to whether any party is so interested or not, subject to appeal, as provided by section 3 of article 3 of the agreement.

#### "ARTICLE IV.

"Any willful under billing in weights or billing of freight at wrong classification shall be considered a violation of this agreement, and the rules and regulations of any weighing association or inspection bureau as established by it, or as enforced by its officers and agents, shall be considered binding under the provisions of this agreement, and any willful violation of them shall be subject to the penalties provided herein.

#### "ARTICLE V.

"The expenses of the association shall be borne by the several parties in such proportion as may be fixed by the chairman. Any member not satisfied with the allotment so made may appeal to the association, which shall, at its first regular meeting thereafter,

determine the matter, which may be done by a two thirds vote of the members.

#### “ARTICLE VI.

“There shall be an executive committee of three members, to be elected by unanimous vote. The committee shall approve the appointment and salaries of necessary employes, except that of the chairman, and authorize all disbursements. All action of this committee shall be unanimous.

#### “ARTICLE VII.

“In case the managers of the lines parties hereto fail to agree upon any question arising under this agreement that shall be brought before the association, it shall be referred to an arbitration board, which shall consist of three members of the executive board of the Interstate Commerce Railway Association; provided, however, that, in case of arbitration in which the members of this association only are interested, they may, by unanimous vote, substitute a special board.

#### “ARTICLE VIII.

“This agreement shall take effect April 1, 1889, subject thereafter to thirty days’ notice of a desire on the part of any line to withdraw from or amend the same.”

The bill further alleges that this agreement took effect April 15, 1889; that under it rules, regulations, and rates for carrying freight over the railroads of the defendant companies were fixed by the association, and have since been maintained by them; that since that date these railroad companies have declined and refused at all times to fix or give rates for the carriage of freight based upon the cost of constructing and maintaining their several lines of railroad and the cost of carrying freights over the same, and such other elements as should be considered in establishing tariff rates upon each particular road; and that the people engaged in interstate commerce have been compelled to pay the arbitrary rates of freight, and to submit to the arbitrary rules and regulations established and maintained by the association formed under

the agreement, and have been and are deprived of the benefits that might be expected to flow from free competition between the several lines of railroad of the defendant companies, and that in this way the defendant companies have combined in restraint of trade and commerce among the states, and have attempted to monopolize, and have monopolized, a part of this commerce.

Three of the railroad companies were not members of the association, and will not be further noticed. The answers of the 15 companies who were members of the association are substantially the same. The first defense in these answers is that the Interstate Commerce Law of February 4, 1887, entitled "An Act to Regulate Commerce"<sup>1</sup> and the acts amendatory thereof, constitute a complete code of laws regulating that part of commerce among the states and with foreign nations which relates to transportation, and that the Act of July 2, 1890, is not applicable to, and does not govern, them or their actions.

Coming to the merits of the suit, these defendants admit that they are common carriers; that, with some exceptions not important here, they owned independent and competing lines of railroad in that part of the United States west of the Missouri and Mississippi rivers, and that they were engaged in the transportation of freight among the states and territories, and to and from foreign nations, in that region, but they deny that they owned the only through lines of railroad engaged in that business there; and allege that there were several others, to wit, the Northern Pacific Railroad Company, the Great Northern Railway Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. They admit that some of them were assisted and encouraged to construct and maintain through competing lines of railroad, independent of each other, by subsidies, land grants, and donations from the United States, and from the people of the various states and territories west of the great rivers. They admit that they entered into the agreement March 15, 1889, and that rules, regulations, and rates of freight have since been fixed and charged by the association thus formed, and that they have

<sup>1</sup> 24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 529.

complied with and maintained them. They deny, however, that at the time they entered into the agreement they were dissatisfied with the rates of freight they were receiving. They deny that they intended, in connection with the formation of the association or otherwise, to unjustly or oppressively augment such rates, or to counteract the effect of free competition on prices or facilities of transportation, or to establish or to maintain arbitrary rates, or to prevent any one of the defendants from reducing rates, or to procure unreasonably great sums of money from the people of the states and territories west of the great rivers engaged in interstate commerce. They deny that the formation and operations of the association have had any such effects, but aver that they have tended to decrease rates, and to benefit the people and the roads. They deny that they had any intention by the formation of the association to monopolize or attempt to monopolize the freight traffic of the region affected by it, and deny that it has had any such effect. They allege that they were subject to the provisions of the Act of Congress of February 4, 1887, entitled "An Act to Regulate Commerce," and the acts amendatory thereof. They aver that under that Act they were required to make all charges reasonable and just; that they were prohibited from making any unjust discriminations, or any undue or unreasonable preferences, or from giving any undue advantages, and that they were required to establish a classification of freight and rates of freight, and to publish and file with the Interstate Commerce Commission schedules showing this classification and these rates, and then to abide by and maintain them; that, in order to comply with this law, consultation between and concerted action of the railroad companies conducting the transportation business west of the great rivers was essential; and that they made this agreement and formed this association in order that they might more effectually comply with the provisions of this law than they could do acting independently. They allege that the rates they have established and maintained have been reasonable and just; that since the organization of the association more than 200 reductions of rates have been made through its action; that their agreement forming the association was filed with the Interstate

Commerce Commission under the Act, and that the rules, regulations, and rates they have established and maintained have been in strict conformity to the provisions thereof. They deny that the people have been deprived of the benefits which might be expected to flow from free competition in the business of transportation, and allege that the utmost freedom compatible with obedience to the Interstate Commerce Act and with the preservation of the existing agencies of competition prevails, and they insist that their association and action under this contract constitute no combination or conspiracy in restraint of interstate or international commerce.

The decision insists that contracts between competing corporations, commonly termed "pooling contracts," to divide their earnings from the transportation of freight in fixed proportions, have long been held void by the courts as against public policy. Such contracts do not simply restrict competition, they tend to destroy it; and, if they do not affect that result, it is only because they do not completely accomplish their main purpose. When acting independently, the spur of self-interest drives each corporation to furnish the people with the best accommodations and the safest and most rapid transportation at the lowest profitable rates, in order that it may attract larger patronage and gather increased gain. But under the operation of a pool this incentive to exertion is withdrawn. Each carrier finds it to its interest to enhance the price of carriage, and finds that its profits are not sensibly diminished by furnishing poor facilities for transportation and inexpensive and mean accommodations. In 1887 Congress recognized and adopted this rule of public policy, and by section 5 of "An Act to Regulate Commerce," commonly called the "Interstate Commerce Act"<sup>1</sup> prohibited such contracts between common carriers engaged in interstate or international commerce. That Act, however, prohibited contracts for the pooling of freights of different and competing railroads only; it prohibited contracts that thus destroyed competition; it did not prohibit all contracts that in any way restricted or regulated com-

<sup>1</sup> 24 Stat. at L. 379, chap. 104; Rev. Stat. Supp. 529.

petition. By the Act of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly called the "Anti-Trust Act,"<sup>1</sup> Congress provided that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act."

The government bases this suit on these provisions of the latter Act. It claims that the contract in question, and the association formed under it, are illegal on three grounds: First, because the contract prevents free and unrestricted competition between competing lines of railroad; second, because it tends to create a monopoly; and third, because the railroad corporations have through this contract abandoned the discharge of some of their duties to the public.

The first ground stated is chiefly relied on, and it presents questions of deep interest, the decision of which must have a far-reaching and important influence on the transportation system of the nation. The government does not claim that the contract and association assailed effected a pooling of freights, or that they tend to retard improvement in the facilities afforded for safe, quick, and convenient transportation, or that they are obnoxious to any of the provisions of the Interstate Commerce Act; but it insists that the Anti-Trust Act prohibits all contracts and com-

<sup>1</sup>26 Stat. at L. 309, chap. 647; Rev. Stat. Supp. 762.

binations between competing railroad corporations which in any manner restrict free competition. The argument is, the Anti-Trust Act prohibits any contract between competing railroad companies that restricts competition. This contract restricts competition; therefore it is illegal. Is, then, every contract between competing railroad companies that in any manner imposes a restriction upon competition a "contract in restraint of trade" and illegal within the meaning of the Anti-Trust Act? Is the existence of restriction upon competition the standard by which the legality of these and all other contracts must be measured under that Act? And if not, by what standard shall their legality be determined? These are questions that the position of the government compels consideration of before it can be determined whether or not this contract is void. Their determination demands a careful examination and construction of that part of the Anti-Trust Act which declares that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states," is illegal. No definition of these terms is found in this Act, but the terms are not new. For more than 200 years before it was passed the courts of England and America had from time to time declared that certain classes of contracts in restraint of trade were against public policy, and therefore illegal and void under the common law. The line of demarcation between these illegal contracts and the innumerable valid agreements that are daily made in the business world had been drawn by long lines of decisions, and had been repeatedly pointed out by the Supreme Court of the United States.<sup>1</sup> Two years before its passage Congress had enacted the Interstate Commerce Law. They had there provided a code of rules and established a commission for the express purpose of regulating that part of interstate and international commerce which relates to transportation. Under these circumstances, three well settled rules of construction must be applied to ascertain the meaning and scope of the Act:

<sup>1</sup> *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67.

(1) It must be read in the light of all general laws upon the same subject in force at the time of the passage of the Act.

(2) Where words have acquired a well understood meaning by judicial interpretation, it is to be presumed that they are used in that sense in a subsequent statute, unless the contrary clearly appears.

(3) Where Congress creates an offense, and uses common law terms, the courts may properly look to that body of jurisprudence for the true meaning of the terms used, and, if it is a common law offense, for the definition of the offense if it is not clearly defined in the Act adopting or creating it.<sup>1</sup>

Thus we must consider the statutes in force and the decisions that had been rendered when this Act was passed to determine what contracts in restraint of trade were then illegal, for it is clear both from the rules referred to and from the title of the Act, viz: "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," that it was such contracts, and such contracts only, that Congress intended to declare unlawful and criminal in interstate commerce.

Under the common law, the ground on which contracts in restraint of trade were declared unlawful was that they were against public policy. But when it becomes necessary to consider grounds of public policy in the determination of a case, it is well to bear in mind the oft quoted remarks of Justice Burrough in *Richardson v. Mellish*, 3 Bing. 252, that public policy "is a very unruly horse, and when you once get astride of it you never know where it will carry you. It may lead you from the sound law." Public policy changes with the changing conditions of the times. It is hardly to be expected that a people who are transported by steam with a rapidity hardly conceived of a century ago, who are in constant and instant communication with each other by electricity, and who carry on the most important commercial transactions by the use of the telegraph while separated by thousands of miles, will entertain precisely the same views of what is condu-

<sup>1</sup> *United States v. Armstrong*, 2 Curt. 446; *United States v. Coppersmith*, 4 Fed. Rep. 198; *Re Green*, 52 Fed. Rep. 104, 111; *McCool v. Smith*, 66 U. S. 1 Black, 459, 469, 17 L. ed. 218, 221; *McDonald v. Lovey*, 110 U. S. 619, 628, 28 L. ed. 269, 271.



cive to the public welfare in commercial and business transactions as the people of the last century, who lived when commerce crept slowly along the coasts, shut out of the interior by the absence of roads, and hampered by an almost impassible ocean. In 1415 a writ of debt was brought on an obligation by one John Dier, in which the defendant alleged the obligation in a certain indenture which he put forth, and on condition that if the defendant did not use his art of a dyer's craft, within the city where the plaintiff, etc., for half a year, the obligation to lose its force, and said that he did not use his art within the time limited. Hull, J., said: "In my opinion, you might have demurred upon him that the obligation is void, inasmuch as the condition is against the common law; and, per Dien, if the plaintiff were here, he should go to prison till he paid a fine to the king.<sup>1</sup> In 1841, Lord Langdale, master of the rolls, held that a contract made by a lawyer not to practice his profession in Great Britain for 20 years was not against public policy, and that it was valid.<sup>2</sup> In 1843, the court of exchequer held that an agreement not to practice as a surgeon dentist in London or any other town where the plaintiffs might have been practicing was reasonable and lawful so far as it related to London, but against public policy and void as to the other towns.<sup>3</sup> In 1869, Vice Chancellor James sustained a contract by vendors not to carry on or allow others to carry on in any part of Europe the manufacture or sale of certain kinds of leather so as in any way to interfere with the exclusive enjoyment by the purchasing company of the manufacture and sale thereof, and issued an injunction to enforce it.<sup>4</sup> In 1889 the supreme court of New York sustained a contract not to manufacture or sell thermometers or storm glasses throughout the United States for ten years.<sup>5</sup> And in 1891 the United States Supreme Court held that a contract giving the Pullman Southern Car Company the exclusive right to furnish all drawing room and sleeping cars

<sup>1</sup> Y. B., 2 Hen. V. fol. 5, pl. 26.

<sup>2</sup> *Whitaker v. Howe*, 3 Beav. 383.

<sup>3</sup> *Mallan v. May*, 11 Mees. & W. 652, 667.

<sup>4</sup> *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345.

<sup>5</sup> *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, 163.

required by that road during a period of fifteen years was not an illegal restraint of trade, and sustained it.<sup>1</sup> It is with the public policy of to-day, as illustrated by public statutes and judicial decisions, that courts have now to deal. In considering that subject, courts are not governed by their own views of the interests of the people, or by general considerations tending to show what policy would probably be wise or unwise. Such a standard of determination might be unconsciously varied by the personal views of the judges who constitute the court. The public policy of the nation must be determined by its Constitution, laws, and judicial decisions. So far as they disclose it, it is the province of the court to learn and enforce it, beyond that it is unnecessary and unwise to pursue inquiries.<sup>2</sup>

Turning first, then, to the decisions. It has long been settled that contracts or combinations of the producers or dealers in staple commodities of prime necessity to the people, to restrict or monopolize their supply or enhance their price, pooling contracts, or combinations between such producers or dealers to divide their profits in certain fixed proportions, and pooling contracts or combinations between competing common carriers, are illegal restraints of trade, and void; while contracts or combinations between employers or workmen to fix and abide by certain prices for labor or services may be valid in their inception, but become illegal restraints of trade whenever the associations formed under them interfere with the freedom of those who are not members to refuse to abide by their prices, or to employ or be employed at other rates, or whenever such associations undertake to prevent nonmembers from using their property or their labor as they see fit. The main purpose of contracts of these classes that are thus held illegal is to suppress, not simply to regulate, competition; and, if suppression is not effected, it is because the contracts fail to accomplish their purpose. It is evident that there is a wide difference between such contracts and those the purpose of which

<sup>1</sup> *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 129 U. S. 79, 35 L. ed. 97.

<sup>2</sup> *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. ed. 205, 233; *Swann v. Swann*, 21 Fed. Rep. 299.

is to so regulate competition that it may be fair, open, and healthy, and whose restriction upon it is slight, and only that which is necessary to accomplish this purpose. It does not necessarily follow that contracts of the latter class constitute illegal restraints of trade because those of the former classes do.<sup>1</sup>

To maintain the proposition that any contract between common carriers that restricts competition in any degree is an illegal restraint of trade, numerous cases may be cited where such expressions as the following are found in the opinions of the courts: "The people have a right to the necessities and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition."<sup>2</sup> "It is against the general policy of the law to destroy or interfere with free competition, or to permit such interference or destruction."<sup>3</sup> "Combinations and conspiracies to enhance the price of any article of trade and commerce are injurious to the public."<sup>4</sup> "Whatever destroys, or even restricts, competition in trade, is injurious, if not fatal, to it."<sup>5</sup> A careful and patient examination of the cases cited, however, discloses the fact that the contracts considered in those cases, which are not of doubtful authority, were of one of the classes already referred to, or rest upon some other ground than the existence of restriction upon competition.<sup>6</sup> It was natural that in the discussion of contracts

<sup>1</sup> Ray, Contractual Limitations, §§ 57, 58, 59.

<sup>2</sup> *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277.

<sup>3</sup> *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372.

<sup>4</sup> *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501.

<sup>5</sup> *Hooker v. Vandewater*, 4 Denio, 349, 353, 47 Am. Dec. 258.

<sup>6</sup> They were cases involving contracts of competing producers or dealers to limit the supply and enhance the price of, or to monopolize, staple commodities, like *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *India Bagging Asso. v. Kock*, 14 La. Ann. 168; *United States v. Jellico Mountain Coal & C. Co.* 12 L. R. A. 753, 46 Fed. Rep. 432; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *De Witt Wire Cloth Co. v. New Jersey Wire Cloth Co.* 14 N. Y. Supp. 277; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666; and *People v. North River Sugar Ref. Co.* 54 Hun, 354; or cases involving pooling contracts, like *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 375; *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *Morrill v. Boston & M. R. Co.* 55 N. H. 531; *Denver & N. O.*

of these classes the courts should condemn in unmeasured terms the suppression of competition, but in none of these cases were they required to hold, and in none of them did they hold, in the decisions when read in relation to the facts of the cases respectively, that every restriction of competition by contracts of competing dealers or carriers was illegal. These decisions rest upon broader ground,—on the ground that the main purpose of the obnoxious contracts was to suppress competition, and that they thus tended to effect an unreasonable and unlawful restraint of trade; they rest on the well settled rules, and come within the well defined classes, above referred to.

A more extended view of the authorities strengthens this conclusion, and makes plain the line of demarcation which separates legal contracts that incidentally restrict competition from illegal contracts in restraint of trade. The decision in the leading case upon this subject,<sup>1</sup> the case which Chief Justice Fuller says is the foundation of the rule in relation to the invalidity of contracts in restraint of trade,<sup>2</sup> held that a contract that clearly restricted competition was not an illegal restraint of trade. The action was upon a bond the condition of which was that the obligor, who was the assignor of a lease of a bakehouse and messuage in the parish of St. Andrews Holborn, would not exercise his trade of a baker within that parish for three years. The contract was held valid, and the action sustained. This decision was rendered in 1711. Chief Justice Parker, in delivering it, de-

*R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; and *Woodruff v. Berry*, 40 Ark. 252; or cases involving combinations of workmen which compelled nonmembers to abide by the prices for labor which they had fixed or to abandon their employment, like *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501, and *United States v. Workingmen's Amalgamated Council*, 54 Fed. Rep. 994, 1000; or cases where the contracts were *ultra vires* the corporations, and their purpose and effect was to monopolize trade, like *Central R. Co. v. Collins*, 40 Ga. 582; *Hazlehurst v. Savannah, G. & N. A. R. Co.* 43 Ga. 13; and *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781; or cases of questionable authority, like *Com. v. Carlisle*, Bright. (Pa.) 36, 39. See, *contra*, *Snow v. Wheeler*, 113 Mass. 179, 185; *Bowen v. Matheson*, 14 Allen, 499; *Skrainka v. Scharringhausen*, 8 Mo. App. 522; and *Carew v. Rutherford*, 106 Mass. 1, 14, 8 Am. Rep. 287.

<sup>1</sup> *Mitchell v. Reynolds*, 1 P. Wms. 181, 1 Smith, Lead. Cas. [7th Am. ed.] pt. 2, p. 708.

<sup>2</sup> *Gibbs v. Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984.

clared that contracts in partial restraint of trade were valid if made upon sufficient consideration, but that contracts in general restraint of trade were illegal, because they deprived the party restrained of his livelihood and the subsistence of his family, and the public of a useful member. The point actually decided, that contracts in partial restraint of trade may be sustained, has been uniformly approved, but in the development of the law applicable to this subject there has been added to it the further condition that the restriction imposed must be reasonable in view of all the facts and circumstances of each particular case. The remark of Chief Justice Parker that contracts in general restraint of trade are illegal—a remark that was not necessary to the determination of the question before him—has been, to say the least, greatly modified by subsequent decisions. There is a plain tendency in the later authorities to repudiate the proposition that there is any hard and fast rule that contracts in general restraint of trade are illegal, and to apply the test of reasonableness to all contracts, whether the restraint be general or partial.<sup>1</sup> In *Tullis v. Tullis*, 1 El. & Bl. 391, the court of queen's bench held, in 1853, that a covenant restricting competition, which bound the covenantor not to exercise his trade of a canvassing publisher in London or within 150 miles of the general postoffice, or in Dublin or Edinburgh, or within 50 miles of either, or in any other town where the covenantee or his successors had an establishment or might have had one within six months preceding, was not an illegal restraint of trade, and enforced it. In *Mogul SS. Co. v. McGregor*, 21 Q. B. Div. 544, certain shipowners engaged in the carrying trade between London and China had formed an association for the purpose of keeping up the rate of freights in the tea trade, and securing that trade to themselves. They accomplished this purpose by allowing a rebate of 5 per cent on all freights paid by shippers who shipped in their vessels only, and thus partially or entirely excluded the plaintiffs, who were competing shipowners, from the tea carrying trade. The latter brought suit for an injunction and damages, but, notwithstanding the obvious restric-

<sup>1</sup> Ray, Contractual Limitations, §§ 57, 58, 59.

tion upon free competition, Lord Coleridge held that the association was not an unlawful combination in restraint of trade, and gave judgment for the defendants. This decision was rendered in 1888. It was sustained on appeal,<sup>1</sup> and finally affirmed by the house of lords.<sup>2</sup> In *Perkins v. Lyman*, 9 Mass. 522, the supreme judicial court of Massachusetts held, in 1813, that a contract by a merchant not to be interested in any voyage to the northwest coast of America was not invalid as in restraint of trade. In another case<sup>3</sup> a contract of a match manufacturer never to manufacture or sell any friction matches in the District of Columbia, or in any part of the United States except Idaho and Montana, was sustained and enforced. The Supreme Court in 1873<sup>4</sup> decided that a contract between two steam navigation companies engaged in the business of transportation on the rivers, bays, and waters of California, and on the Columbia river and its tributaries, respectively, was declared by the Supreme Court not to be in restraint of trade, although it prohibited the use of a certain steamer in the waters of California for ten years. And in 1890 the supreme court of New Hampshire in an exhaustive and persuasive opinion held that contracts by which a railroad corporation leased its road and rolling stock to a competitor for many years were not necessarily against public policy or void at common law, when the purpose of the contracts and combinations did not appear to be to raise the rate of transportation above the standard of fair compensation, or to violate any duty owing to the public by noncompeting companies.<sup>5</sup>

<sup>1</sup> 23 Q. B. Div. 598.

<sup>2</sup> 1892, App. Cas. 25.

<sup>3</sup> *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464.

<sup>4</sup> *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315.

<sup>5</sup> *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689. If further authority is wanted for the proposition that it is not the existence of the restriction of competition, but the reasonableness of that restriction, that is the test of the validity of contracts that are claimed to be in restraint of trade, it will be found in *Fowle v. Park*, 131 U. S. 88, 97, 33 L. ed. 67, 74; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. ed. 979; *Re Greene*, 52 Fed. Rep. 104, 118; *Horner v. Graves*, 7 Bing. 735, 743; *Hubbard v. Miller*, 27 Mich. 15, 19, 15 Am. Rep. 153; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 363; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345, 354; *Wickens v. Evans*, 3 Younge & J. 318; *Ontario Salt Co. v. Merchants Salt Co.* 18 Grant Ch. 540; *Mallan v. May*, 11 Mees & W. 652, 657; *Whittaker v. Howe*, 3 Beav. 383; *Kellogg v. Larkin*, 3 Pinney, 123,

From a review of these and other authorities, it clearly appears that when the Anti-Trust Act was passed the rule had become firmly established in the jurisprudence of England and the United States that the validity of contracts restricting competition was to be determined by the reasonableness of the restriction. If the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly, it was illegal. If a contract imposed a restriction that was unreasonably injurious to the public interest, or a restriction that was greater than the interest of the party in whose favor it was imposed demanded, it was illegal. But contracts made for a lawful purpose, which were not unreasonably injurious to the public welfare, and which imposed no heavier restraint upon trade than the interest of the favored party required, had been uniformly sustained, notwithstanding their tendency to some extent to check competition. The public welfare was first considered, and the reasonableness of the restriction determined under these rules in the light of all the facts and circumstances of each particular case.

But it is said that railroad corporations are quasi public corporations, and any restriction upon their competition is against the public policy of the nation. It is not to be denied that there are some expressions to be found in adjudged cases,<sup>1</sup> to the effect that where a business is of such character that it cannot be restrained to any extent whatever without prejudice to the public interests, the courts decline to enforce or sustain contracts imposing such restraint, however partial. But the language employed by the courts in these cases should be read in the light of the circumstances under which it was uttered, and with due reference to the point actually adjudicated. Thus in the earliest of these

150; *Beal v. Chase*, 31 Mich. 490; *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389; *Gloucester Isinglass & G. Co. v. Russia Cement Co.* 154 Mass. 92, 94; *Watertown Thermometer Co. v. Pool*, 51 Hun. 157, 163; *Master Stereodore's Assn. v. Walsh*, 2 Daly, 1; *Hodge v. Sloan*, 107 N. Y. 244; *Brown v. Rounsavell*, 78 Ill. 589; *Jones v. Fell*, 5 Fla. 510, 515; Ray, Contractual Limitations, §§ 57, 58, 59.

<sup>1</sup> *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 409, 32 L. ed. 979, 984; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 32 W. Va. 600, 625; *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* 121 Ill. 530; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781.

cases<sup>1</sup> it was held that a contract between a railroad company and a telegraph company by which the former granted to the latter the exclusive right to construct a telegraph line along its right of way, necessarily excluded all other telegraph lines from the use of a right of way that by condemnation had been devoted to public uses, and was void, because it was in restraint of trade, and tended to create a monopoly. In *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* it was held that an owner of 2000 acres of oil land could not grant to one pipe line company an exclusive right to lay a pipe line across said lands, because the legislature, by authorizing pipe line companies to condemn lands for the construction of such lines, had thereby declared that the public had an interest in their construction, and that a contract which precluded such companies from laying a line across an extensive tract of land was necessarily opposed to public policy. In *Chicago Gaslight & C. Co. v. Peoples Gaslight & C. Co.* the court held that a gas company, which had accepted a charter authorizing it to lay pipes and to supply gas throughout the entire limits of the city, could not disable itself from the performance of the public duty it had undertaken by entering into a contract with another company not to lay pipes and supply gas in a large section of said city. And in *Gibbs v. Consolidated Gas Co.* a like contract by one gas company with another to abandon the discharge of public duties which had been devolved upon it by its charter was held, on that account, to be against public policy, and void, and to be void on the further ground that the contract was in open violation of a statute which prevented the company from "entering into a . . . contract with any other gas company whatever."

No doubt can be entertained that the contract involved in each of the cases last referred to was against public policy for its marked tendency to create a monopoly, and to suppress healthy competition. Two of the contracts were also vicious in the respect that the corporation had attempted to disable itself from exercising powers which had been conferred upon it for the pub-

<sup>1</sup> *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781.



lie advantage. But, in view of the state of facts on which the decisions were predicated, and the points actually adjudicated, it would be unwise to deduce an unbending rule that any and every contract between two railway companies which enjoins or contemplates concert of action in the matter of establishing freight or passenger rates between competitive points is against public policy, and an unlawful restraint of trade. No case has yet gone to that extent, or has declared that the business of transporting freight and passengers by rail is of such character that no restraint whatever upon competition therein is permissible. On the contrary, contracts between common carriers which imposed some restrictions upon competition have been frequently sustained by our highest courts, and the rule has been often applied that the test of their validity was not the existence, but the reasonableness, of the restriction imposed.<sup>1</sup> But even if such an extreme view, as is above indicated, was once tenable, it cannot well be maintained since the passage of the Interstate Commerce Law, and the action that has been taken thereunder by the government Commission which was created to enforce its provisions. The Interstate Commerce Law imposes several important restrictions upon the right of railway companies to do as they please in the matter of making and altering rates, and Congress has thereby expressed its conviction that unrestrained competition between carriers is not, at the present time, and under existing conditions, most conducive to the public welfare, but that other things are quite as essential to the public good. Mark the difference in public policy towards merchants and railroad companies exhibited by the common law and by the Interstate Commerce Act. Merchants may refuse to sell their wares at all, they may refuse to transact any business; but railroad companies are common carriers; they must furnish transportation when requested; they must operate their roads or forfeit their franchises; merchants may charge any price they may see fit for their wares, but railroad companies are

<sup>1</sup> *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97; *Mogul S.S. Co. v. McGregor*, 21 Q. B. Div. 544; *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689; *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 389, 39 Am. Rep. 519.

restricted to reasonable and just charges for transportation (Interstate Commerce Act, § 1); merchants may sell articles of like character and value for as many different prices as they have different customers, but railroad companies are restricted to the same charges to all their customers for like services (Interstate Commerce Act, § 2); merchants may give to any customers or any localities any preference or advantage they choose over other customers or localities, but railroad companies are prohibited from giving any undue preference or advantage to any party or place (Interstate Commerce Act, § 3); merchants may sell articles of inferior value for higher prices than those they charge and receive for those of greater value, but railroad companies are prohibited from charging or receiving a greater compensation for a short haul than for a long haul (Interstate Commerce Act, § 4); merchants may keep their prices secret; railroad companies must publish their rates for transportation, and are prohibited from charging or receiving a greater or less compensation than that specified in the published schedules (Interstate Commerce Act, § 6); merchants may change their prices instantly and without notice, railroad companies are prohibited from increasing their rates except after ten days' public notice or from decreasing them except after three days' public notice (Interstate Commerce Act, § 6); merchants may transact their business free from the supervision or interference of the government; but railroad companies are subject to the supervision of a Commission, established by the government, authorized to take the necessary proceedings for the enforcement of these restrictions (Interstate Commerce Act, § 12). These restrictions relate almost exclusively to rates for the transportation of freight and passengers. They are numerous, radical, and effective. They became operative by an Act of Congress three years before the Anti-Trust Act was passed, and they establish beyond cavil that from that date the public policy of the nation was that competition between railroad companies engaged in interstate commerce should not go wholly unrestricted.

Turn now to the published reports of the Interstate Commerce Commission, whose opinion on such matters is certainly entitled to great consideration, the view is even more clearly expressed

that it was the purpose of Congress to place important restraints upon competition; that uncontrolled struggles for patronage by railway carriers are frequently detrimental to the public welfare; that rate wars are especially injurious to the business interests of the country and contrary to the spirit of existing laws; that the Interstate Commerce Act invites conferences between railway managers, and that concert of action in certain matters by railway companies is absolutely essential to enable it to accomplish its true purpose.

In the Fourth Annual Report of the Commission, at page 19, is found the following statement:

“It is thus seen at every turn that the regulation of rates on a consideration of the pecuniary or other situation of any single road, and without a survey of the whole field of operations whereby its business may be affected, and under a supposition that what is done in respect to that road may be limited in its consequences, is entirely antagonistic to all principles of railroad transportation. The railroad managers have perceived this from the very first, and it is because they have perceived this that they have been compelled to organize themselves into railroad associations, for the purpose of agreeing upon classifications and rates, and upon a great variety of other matters pertaining to the methods of conducting interlocking and overlapping business, and all business affected by competitive forces.” And on page 21 of the same report the following:

“In former reports, the Commission has referred to the undoubted fact that competition for business between railroad companies is often pushed to ruinous extremes, and that the most serious difficulties in the way of securing obedience to the law may be traced to this fact. When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of the existing law is against them.”

In the Second Annual Report, on page 25, when speaking of the unity of railroad interests, the Commission uses this language:

“But the voluntary establishment of such extensive responsi-

bility would require such mutual arrangements between the carriers as would establish a common authority, which should be vested with power to make traffic arrangements, to fix rates, and to provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understanding as might be agreed upon."

And in the same report, on page 28, is the following:

"A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of a power to annoy and embarrass is a fact of large importance. The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibilities, just as far as may be possible, so that the public may have, in the services performed, all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers as well as to the public, and their voluntary extension may be looked for until, in the strife between roads, the limits of competition are passed, and warfare is entered upon. But, in order to form them, great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated."

In the First Annual Report, on page 33, the Commission further said:

"To make railroads of the greatest possible service to the country, contract relations would be essential, because there would need to be joint tariffs, joint running arrangements and interchange of cars, and a giving of credit to a large extent, some of which were obviously beyond the reach of compulsory legislation,

and, even if they were not, could be best settled, and all the incidents and qualifications fixed, by the voluntary action of the parties in control of the roads respectively. Agreement upon these and kindred matters became, therefore, a settled policy, and short independent lines of road seemed to lose their identity, and to become parts of great trunk lines, and associations were formed which embraced all the managers of roads in a state or section of the country. To these associations were remitted many questions of common interest, including such as are above referred to. Classification was also confided to such associations, it being evident that differences in classification were serious obstacles to a harmonious and satisfactory interchange of traffic. But what perhaps, more than anything else, influenced the formation of such associations, and the conferring upon them of large authority, was the liability, which was constantly imminent, that destructive wars of rates would spring up between competing roads to the serious injury of the parties and the general disturbance of business. Accordingly, one of the chief functions of such associations has been the fixing of rates, and the devising of means whereby their several members can be compelled or induced to observe the rates when fixed."

It is not necessary to state the reasons which probably influenced Congress to impose some restrictions upon competition in the matter of railway transportation, and to place railway carriers under the operation of a law which, for its successful execution, as pointed out by the Interstate Commerce Commission, seems to some extent to invite conference and concert of action. It is unnecessary to state the reasons why railroad companies should be accorded the privilege of entering into arrangements with other companies which may, to some extent, regulate competition. Reasons to that effect have been stated with great ability and persuasive force in some of the cases.<sup>1</sup> It is sufficient to say that there was no hard and fast rule in force when the Anti-Trust Act was enacted which made every contract between railroad companies void on grounds of public policy if it in any wise checked

<sup>1</sup> *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 3 Inters. Com. Rep. 319, 9 L. R. A. 689.

competition. The more reasonable doctrine then prevailed, especially in view of the recent passage of the Interstate Commerce Act, that such contracts were void if, judged in the light of all the circumstances and conditions under which they were made, they unreasonably restricted competition.

In view of the foregoing principles, it remains only to examine the contract which is alleged to be in violation of the Anti-Trust Act, but before doing so a preliminary observation will not be out of place. The Anti-Trust Act is a criminal statute, and it should not be so construed as to subject persons to the penalties thereby imposed unless the contract complained of is one that is clearly within the provisions of the statute. It is also well to note that the case came before the court simply on bill and answer. The bill alleges that its purpose, and that of the association formed under it, was to suppress competition, enhance rates of freight, and monopolize the traffic. The answers deny these averments, and allege that the purpose of the contract and association was to carry into effect the provisions of the Interstate Commerce Act, and to make rates public and steady. The bill alleges that the effect of the contract and association has been to raise the rates of freight above those which the public might have reasonably expected to obtain from free competition. The answers deny this allegation, and aver that the effect has been to maintain reasonable rates, and that more than 200 reductions of rates have been effected through the association. Upon a hearing on bill and answer the averments of fact contained in the bill were overcome by the denials of the answer, and the averments of fact in the answer stood admitted.<sup>1</sup>

The result is that the government's right to relief therefore rested upon the contract itself, and the fact that the rates maintained under it have not been unreasonable, and that many reductions have been made under its operation. The ordinary rules of interpretation must then be applied to the language of the contract, and, if it appears that its purpose and tendency

<sup>1</sup> *Tainter v. Clark*, 5 Allen, 66; *Brinckerhoff v. Brown*, 7 Johns. Ch. 217; *Perkins v. Nichols*, 11 Allen, 542.

were to unreasonably restrict competition, it must be declared illegal.<sup>1</sup>

In construing the contract it must also be remembered that fraud and illegality are not to be presumed, and that the purpose of the contract is that which is clearly manifest by its terms. In *Mitchell v. Reynolds*, 1 P. Wms. 181, the unfortunate remark "that wherever such contract *stat indifferenter*, and for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad," fell from Chief Justice Parker. This seems to be the reverse of the proposition that every man is presumed to be innocent until he is proved to be guilty. It has long been repudiated by the courts of England and America. The burden is on the party who seeks to put a restraint upon the freedom of contract to make it plainly and obviously clear that the contract is against public policy, and the true rule of construction is that neither fraud nor illegality is to be presumed, but the contract is to be assumed to have been made in good faith for the purpose which appears on the face of it, and not colorably for any other.<sup>2</sup>

Proceeding, then, to an examination of the contract, it is substantially as follows: In the preamble there is a declaration that the association is formed for "mutual protection by establishing and maintaining reasonable rates, rules, and regulations, both through and local." Article 1 declares that substantially all traffic competitive between two or more members in that part of the United States between the Mississippi and Missonri rivers and the Pacific ocean shall be governed by the association. It is provided by article 2 that the association shall choose a chairman by unanimous vote; that there shall be regular monthly meetings of the association in which each member must be represented by some responsible officer authorized to act definitely on all questions to be considered; that a committee shall be appointed to

<sup>1</sup> *Dillon v. Barnard*, 88 U. S. 21 Wall. 430, 437, 23 L. ed. 673, 676; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 569, 577, 35 L. ed. 278, 281.

<sup>2</sup> *Printing & N. Reg. Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 365; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372, 391; *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Met. 384, 389.

establish rates, rules, and regulations for the traffic, and that these shall be put into effect; that any railroad company may give five days' written notice prior to any monthly meeting of any proposed reduction of rates or change of rules, and eight days' notice as to the traffic of Colorado or Utah; that thereupon the reduction or change shall be considered and voted upon by the association at the next monthly meeting, and all members shall be bound by the decision of the association, "unless then and there the parties shall give the association definite written notice that in ten days thereafter they shall make such modification notwithstanding the vote of the association;" that any member may without notice, at its peril, make any rate, rule, or regulation necessary to meet the competition of outside lines, subject to a liability to pay a penalty of \$100 if the association decides by a two thirds vote that the rate, rule, or regulation was not necessary for that purpose; that all arrangements with connecting lines for the division of through rates relating to traffic covered by the agreement shall be made by authority of the association, and that the chairman of the association shall punish violations of the agreement by fines not exceeding \$100 in any case. Article 3 makes the chairman the executive officer of the association, requires him to publish and furnish to the members of the association the rates, rules, and regulations established, and all changes in them, and requires him to enforce the provisions of the contract. Article 4 prohibits under-billing or billing at a wrong classification. Articles 5 and 6 provide for the appointment of the necessary employes and the payment of the necessary expenses of the association. Article 7 provides for arbitration in case the managers of the parties to the agreement fail to agree upon any question arising under it; and article 8 provides that any member may withdraw from the association on 30 days' notice.

It is obvious at a glance that this agreement is not affected by any of the vices of an ordinary pooling contract. The income of each member of the association under the terms of the agreement is still measured by the amount of freight and the number of passengers it carries, and it is still to the interest of each member of the association to make that patronage as great as possible, by



affording to the public superior facilities for safe, speedy, and convenient transportation. Under the operation of the agreement, each company must still compete with its associate members in the character of its roadbed, quality of its equipments, length of route, convenience of its terminal facilities, and in the efficiency of its management, for all of these considerations will necessarily have a marked influence upon the amount of its patronage.

In other of its features, also, the contract is not subject to criticism. In these days, when persons engaged in many other callings and avocations are in the habit of meeting at intervals, as associations, for the purpose of cultivating more friendly relations and establishing regulations conducive to the general welfare of the trade, it is difficult to see upon what just grounds representatives of railway companies can be denied the right of forming associations for the purpose of friendly conference and to formulate rules and regulations to govern railway traffic. The fact that the business of railway companies is irretrievably interwoven, that they interchange cars and traffic, that they act as agents for each other in the delivery and receipt of freight and in paying and collecting freight charges, and that commodities received for transportation generally pass through the hands of several carriers, renders it of vital importance to the public that uniform rules and regulations governing railway traffic should be framed by those who have a practical acquaintance with the subject, and that they should be promulgated and faithfully observed. The advisability of establishing such rules and regulations in the mode above indicated, particularly for the uniform classification of freight, has been frequently pointed out in the reports of the Interstate Commerce Commission. Indeed, the benefits that would result from uniform rules and regulations, and from uniformity in the classification of freight, seem so obvious that it is unnecessary to enumerate them.

It follows, therefore, that the stipulations of such agreements enjoining a monthly conference between representatives of the various members of the associations, and the appointment of a committee to formulate rules and regulations governing the traffic

embraced by the agreements are not only not opposed to public policy, but, if faithfully carried out, will tend to promote the public interests. It is also obvious that the stipulation requiring five days' written notice of a proposed reduction in rates does not, in and of itself, render the contract unlawful. It is certain that a contract not to reduce established rates without a public notice of three days, and not to increase them without a notice of ten days, would not be against public policy, because the Interstate Commerce Act has prohibited such changes with less notice. The plain object of this provision was to prevent competitors from resorting to secret, unfair, and ruinous methods of warfare, to make competition fair and open, and to enable shippers to modify their action to suit the coming changes. There is no purpose of the provision, or of the policy that dictated it, that would not be as well, if not better, served by a notice of fifteen or forty days, as one of three days.

But it has been urged that contracts like the one in question restrains competition in rates, and is therefore unlawful. That it does have some tendency to check competition in that respect can not be denied; but that the restraint imposed is slight, that there is abundant room within the terms of the agreement for the play of all the healthy forces of competition, and that it has a pronounced tendency to prevent sudden and violent fluctuations in rates, commonly termed "rate wars," seems to be equally manifest. It is not reasonable to suppose that any member of such associations which, by virtue of the situation, can really afford to transport freight or passengers between any two competitive points for a substantially less sum than its competitors, will be likely to forego the advantage that its situation gives it even under the operation of the agreement. It is much more probable that, under the operation of such agreements, as under the influence of free competition, the rates between competitive points will be largely, if not entirely, based upon the rate which the road having the shortest line and best facilities esteems fair and reasonable compensation.

It will be observed that under the terms of the agreement no member of the association has bound itself to be governed by a rate

fixed by a vote of the majority for a longer period than ten days after the monthly meeting next succeeding its notification of a proposed change in rates; and for that reason the limitation imposed by the contract upon the right of a member of the association to adopt such a rate as it sees fit is very slight, and the power reposed in the association is correspondingly small. It is not to be supposed, therefore, that the natural or probable effect of such a contract will be to sensibly raise either freight or passenger rates above the level which they would attain under the influence of what is termed "unrestricted competition." On the other hand, it seems highly probable that the contract will prevent sudden and violent fluctuations in freight rates, such as often upset the business calculations of entire communities, and that this is one of the main reasons which lead to the formation of such associations. It must be concluded also that it will have a sensible tendency to induce a more uniform system of classification throughout the great region where the associations operate, and also to induce the establishment of a more perfect code of rules and regulations governing freight traffic. It may also tend to prevent stealthy, secret, and unfair methods of warfare, and to make the strife for patronage among the members of associations open, fair, and honorable. All of these are objects that are in line with the true spirit of the Interstate Commerce Act and an intelligent public policy.

The result is the necessary finding of fact that such contracts in view of all the circumstances and the situation of the parties thereto, do not impose such unreasonable restraints on competition as will warrant the conclusion of law that it is one of those contracts or conspiracies in restraint of trade and commerce among the several states which fall within the inhibition of the Anti-Trust Act of July 2, 1890.

Nor is there any monopoly of trade, or any attempt to monopolize trade, within the meaning of that Act, evidenced by such contracts. So far as can be learned, the associations have never intended to have, and never have had or attempted to have, any trade. They have not held or attempted to obtain or hold any property except the moneys necessary for the bare expenses

required to pay officers and employes. They have been and are mere advisers with their members upon disputed questions submitted by the contracts to consideration. So far as can be learned from the contracts, each member of the associations is striving with every other in the territory, whether a member of the association or not, to divert from the latter and gather to itself all possible trade. There are no provisions in the contracts that the chairman may authorize members to meet the rates of competitors who are not members of the associations, and that any member may meet the rates of such a competitor at its peril; but these provisions were necessary for the protection of members of the associations against the attacks of non-members. Without such provisions unreasonably low rates established by the latter would draw away the business of the members, and deprive them of the opportunity to compete on equal terms. These provisions give no company any higher right or greater power than it had before the contract was made, but simply reserved to each the privilege of exercising its original right to meet competition without giving the fifteen days' notice in case of a warfare upon it by a nonmember.

A monopoly of trade embraces two essential elements: (1) The acquisition of an exclusive right to, or the exclusive control of, that trade; and (2) the exclusion of all others from that right and control. Evidently there is nothing in this contract indicating any purpose or attempt to obtain such a monopoly. The great transportation systems of the Great Northern Railway Company, the Northern Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company were operated in the region subject to the regulation of this association, but none of these companies were members of it; and, even if they had been, there would still have been no evidence of any attempt to monopolize trade here, because each member is left to compete with every other for its share of the traffic.<sup>1</sup>

The position that railroad companies entering into such contracts have so far disabled themselves from the performance of their public duties by the execution of the contracts as to give ground for the avoidance of the contracts, and for a forfeiture of their

<sup>1</sup> *Re Greene*, 52 Fed. Rep. 104, 115.

franchises, cannot be successfully maintained. It is well settled upon principle and authority that, where a corporation by a contract entirely or substantially disables itself from the performance of the duties to the public imposed upon it by the acceptance of its charter, the contract is void, and its franchise may be forfeited. The reasons for this rule, and some of the limitations of it, have been stated,<sup>2</sup> and it is unnecessary to repeat them here. It goes without saying that this rule in no way limits the power of a corporation to discharge its duties through agents of its own selection. There is no doubt that each of these corporations could lawfully appoint an expert or a committee of experts upon the subject of classification and rates of freight upon its road, empower him or them to fix the rates, and then maintain them for forty days unchanged. Practically the fifteen representatives of these companies, at a meeting of the association, their chairman, and their committee that originally fixed the rates and rules, together constitute an advisory committee on rates and rules of traffic, composed of men whose intimate knowledge of the needs of the shippers, and of the character and quantities of the commodities transported through the different portions of the large area traversed by these railroads, and whose wide experience in the effect of various rates upon the accommodation of the public and the business of the companies fit them well to carefully consider and wisely establish just and reasonable rates throughout this territory. Such a committee each company acting independently might have appointed, and it is not perceived that the fact that two or more companies appoint the same men to establish rates and rules for the traffic upon their respective roads in any way invalidates the appointment of either.

Moreover, the power delegated to the association, its committee and chairman, is so limited in extent and so restricted in time that it is hardly worthy of serious consideration as the ground for the avoidance of a contract and the forfeiture of a franchise. The power granted to the committee originally chosen to establish the rates and rules expires by limitation upon a thirty days' notice

<sup>1</sup> *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.* 10 U. S. App. 98, 51 Fed. Rep. 309, 317-321.

of withdrawal from the association; the power of the association itself to prevent modifications and changes in the rules and rates established ceases after fifteen days' notice of an intention to make the modifications and changes notwithstanding its action. It is true that there is a provision in the second article of the agreement that regular meetings of the association shall be held, "unless notice shall be given by the chairman that the business to be transacted does not warrant calling the members together," but the claim that this gives the chairman power to prevent the consideration of proposed changes in rates, and thus to maintain them indefinitely, by preventing a meeting of the association, cannot be serious. The effect of such a contract is that, when a company gives notice of a proposed change of any importance, the meeting shall be held. Such a notice presents business to be transacted that does warrant calling the members together. If, under such circumstances, the chairman gives notice that there is no such business, he violates the contract. The presumption is that he will not violate it; and, if he does do so, that is no ground for an avoidance of the contract.

The result is that neither the contract nor the association formed under it can be held to be obnoxious to the provisions of the Anti-Trust Act in view of the facts admitted by the pleadings, and in the absence of other evidence of their consequences and effect.

Many of the considerations referred to are presented upon the question whether or not the Anti-Trust Act applies to or in any way governs transportation companies that are engaged in that part of interstate and international commerce which consists solely of the transportation of persons and property, in view of the very substantial regulation of this part of commerce provided by the Interstate Commerce Act. The views expressed rendered it unnecessary for the court to determine this question. It rests the decision on the ground that, if the Anti-Trust Act applies to and governs interstate and international transportation and its instrumentalities, the contract and association in question do not appear to be in violation of it.<sup>1</sup>

<sup>1</sup> *United States v. Trans-Missouri Freight Association*, 24 L. R. A. 73, 58 Fed. Rep. 440.

## CHAPTER XV.

### INTERSTATE AND STATE COMMERCE.

- § 106. *Power to Regulate Commerce.*
- § 107. *State Regulations Affecting Common Carriers.*
- § 108. *Interstate Commerce Commission—Jurisdiction and Practice.*
- § 109. *State Railroad Commission.*
- § 110. *Uniform Classification.*
- § 111. *Classification of Freight and Rates.*
- § 112. *Reasonable Rates for Freight.*

#### § 106. *Power to Regulate Commerce.*

Among the powers specifically granted to Congress, and in the exercise of which the power of Congress is supreme, is the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."<sup>1</sup> The power to regulate commerce among the several states, as well as with foreign nations, was delegated to the Federal government in pursuance of a preconceived purpose on the part of the leading representatives of public opinion to provide for and promote the free and unrestricted sale and interchange of commodities between the states. The power is complete in itself with no limit other than that prescribed; and it may operate on any and every subject of commerce to which the legislative discretion may extend.<sup>2</sup> Rates on commerce among the states may be regulated by Federal authority, with reference to trade conditions and circumstances of localities.<sup>3</sup> It appears from contemporaneous history of the condition of the country, especially from the journals of the general assem-

<sup>1</sup> Fed. Const. art. 1, § 8, subd. 3.

<sup>2</sup> *United States v. Marigold*, 50 U. S. 9 How. 560, 13 L. ed. 257; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, 17 Johns. 488; *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Smith v. Turner*, 48 U. S. 7 How. 396, 12 L. ed. 749; *State v. Kennedy*, 19 La. Ann. 397.

<sup>3</sup> *Kauffman Milling Co. v. Missouri Pac. R. Co.* 3 Inters. Com. Rep. 400.

blies of the states and of the Federal convention, that there was a deep seated desire in all parts of the Union to establish a uniform system of commercial regulation, such as would prohibit one state from imposing burdens upon the business of citizens of other states, whether by a tax upon their persons or property *in transitu*, on their goods when offered for sale, or by an imposed tax.<sup>1</sup> The control of commerce, being in the Federal government, is not to be restricted by state authority.<sup>2</sup> The design and object of the grant of exclusive power to Congress were to establish uniformity among the several states, and to prevent unjust and invidious distinctions.<sup>3</sup> The power of Congress is exclusive only when exercised, or when states are expressly prohibited.<sup>4</sup> The earlier cases that gave rise to the construction of this clause of the Constitution were chiefly controversies as to the right of a state to levy a tax upon passengers or products passing through and along its highways to a market beyond its borders. The test of constitutionality to which every doubtful state statute was subjected was involved in the inquiry whether its enforcement would tend to trammel the trade between citizens of different states or embarrass them in passing from one to another. The idea was crystallized by Justice Strong in the definition of "regulating commerce," given by him in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. ed. 529, to wit: "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation."<sup>5</sup>

Waters navigable in themselves in a state, and connecting with

<sup>1</sup> 1 Elliott, Deb. 140; 5 Elliott, Deb. 540.

<sup>2</sup> *Pembina Consol. S. Min. & M. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24.

<sup>3</sup> *Veazie v. Moor*, 55 U. S. 14 How. 568, 14 L. ed. 545; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

<sup>4</sup> *Re Brinkman*, 7 Nat. Bankr. Reg. 425; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Smith v. Turner*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Com. v. O'Hara*, 1 Nat. Bankr. Reg. 86; *Re Brown*, 3 Nat. Bankr. Reg. 250; *Martin v. Berry*, 37 Cal. 208.

<sup>5</sup> *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Philadelphia & R. R. Co. v. Pennsylvania* ("The State Freight Tax") 82 U. S. 15 Wall. 232, 21 L. ed. 146; *Welton v. Missouri*, *supra*; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.



other navigable waters so as to form a waterway to other states or foreign nations, cannot be obstructed or impeded so as to impair, defeat, or place any burden upon a right to their navigation granted by Congress; such right, owners of steam tugs, enrolled and licensed under the law of the United States, have. A state cannot interfere with or put obstructions upon commerce authorized by the United States, and over which Congress has control, without coming in contact with the exclusive power of Congress to regulate commerce, interstate and foreign. The ordinance of the city of Chicago, requiring a license fee for steam tug boats navigating the Chicago river, which boats were engaged in the coasting and foreign trade and in towing vessels engaged in interstate commerce, is invalid. A license exacted for the use of tugs for towing vessels into the Chicago river and its adjacent waters is not one exacted for the special improvement of deepening the river, nor to pay the expenses of such improvement.<sup>1</sup>

"Commerce," said Chief Justice Marshall, "undoubtedly is traffic, but it is something more; it is intercourse." The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and, under our system of government, is vested in the legislatures of the several states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state constitution, or with the Federal Constitution, or laws made under its delegated powers.<sup>2</sup> So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce, and to expedite, instead of hindering, the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at

<sup>1</sup> *Harmon v. Chicago*, 147 U. S. 396, 37 L. ed. 216.

<sup>2</sup> *Martin v. Hunter*, 14 U. S. 1 Wheat. 326, 4 L. ed. 102; *State v. Moore*, 104 N. C. 714; *Philadelphia & R. R. Co. v. Pennsylvania* ("State Tax on Railway Gross Receipts") 82 U. S. 15 Wall. 284, 21 L. ed. 164.

all.<sup>1</sup> Intercourse by telegraph between states is interstate commerce, and a state has no authority to regulate same.<sup>2</sup> And in cases arising under the law merchant, the Supreme Court of the United States has held itself less bound by the decisions of the state courts than in other cases.<sup>3</sup> The Supreme Court of the United States has also, in a long line of cases, passed upon the power assumed by some of the states to impose a tax on persons or goods *in transitu* to another state—a license tax upon traveling salesmen who might offer to sell within their borders merchandise manufactured in or commodities shipped from another state before such articles of commerce should become intermingled with its own products.

Thus, a circuit court of the United States has held that a license tax of \$500 per annum, imposed on every person selling in a city any meat which is not from animals of his own raising, unless he rents a stall in a public market, while the rent of such stall is \$150 per year and the market regulations are so restricted and burdensome as to preclude the reasonable conduct of a wholesale business there, is unconstitutional in respect to wholesale dealers in meat brought from other states, by reason of the necessarily resulting discrimination against them, although the ordinances on the subject on their face purport to apply to vendors irrespective of the places from which it comes,—especially where neither sales nor inspection of meat are restricted to the market, and the regulations are clearly made for the purpose of revenue, and not merely to prevent the sale of uninspected meat.<sup>4</sup> These adjudications within the last decade marked much more clearly the line to which Congress may rightfully claim exclusive author-

<sup>1</sup> *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710.

<sup>2</sup> *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31.

<sup>3</sup> *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

<sup>4</sup> *Georgia Picking Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. Rep. 774.

ity to legislate, and have also indicated more definitely the limits to which the states may still cross that boundary in the exercise of permissive police power. The controlling principle which pervades all of them is that only such legislation by the states is inhibited as impedes, obstructs, or controls commerce, or comes in conflict with some statute passed by Congress to regulate it.<sup>1</sup> In *Hunnibal & St. J. R. Co. v. Husen*, 95 U. S. 470, 24 L. ed. 529, Justice Strong, delivering the opinion, said: "Many acts of a state may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term; and it is sometimes difficult to distinguish between that which merely affects or influences, and that which regulates or furnishes a rule of conduct. . . . While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent animals suffering from contagious or infectious diseases, or convicts, from entering the state; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws—it may not interfere with transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not under cover of exerting its police power, substantially prohibit or burden either foreign or interstate commerce. In *Welton v. Missouri*, 91 U. S. 282, 23 L. ed. 350, it is said: "The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered in reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled."

Where the regulation of commerce requires a uniform rule, the power of Congress is exclusive; but where it requires differ-

<sup>1</sup> *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Inman SS. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118; *Wilkerson v. Rahrer*, 140 U. S. 545, 35 L. ed. 572; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Philadelphia & S. Mail SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308.

ent rules in different localities, the states may legislate, but only in the absence of congressional legislation.<sup>1</sup> It is for Congress in its discretion to determine when its full power shall be brought into activity, and when it legislates, the states are absolutely prohibited from interfering.<sup>2</sup> A state statute in conflict with a congressional regulation of commerce is unconstitutional as an invasion of the exclusive power of Congress.<sup>3</sup>

The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from any restraint which it has the right to impose, except as by such statutes as are passed by the state for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid Federal legislation.<sup>4</sup> The failure of Congress to make express regulations indicates that the subject shall be free.<sup>5</sup> Familiar instances of statutes falling within the foregoing exception are found in those relating to harbor pilotage, beacons, buoys, the improvement of navigable waters, the examination as to fitness of engineers and other railroad employees, and which are discussed by the courts in the cases cited above. The validity of these and other state laws, which relate directly to, or indirectly affect, com-

<sup>1</sup> *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96; *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745; *Ex parte McNeil*, 80 U. S. 13 Wall. 240, 20 L. ed. 625; *Pound v. Turck*, 95 U. S. 462, 24 L. ed. 526; *Mitchell v. Steelman*, 8 Cal. 363; *People v. Central Pac. R. Co.* 43 Cal. 404.

<sup>2</sup> *United States v. Coombs*, 37 U. S. 12 Pet. 72, 9 L. ed. 1004; *New York v. Miln*, 36 U. S. 11 Pet. 155, 9 L. ed. 669; *Gilman v. Philadelphia*, *supra*; *United States v. New Bedford Bridge*, 1 Woodb. & M. 421.

<sup>3</sup> *Sinnot v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243; *Blanchard v. The Martha Washington*, 1 Cliff. 473; *Ex parte Ah Fong*, 3 Sawy. 145; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543.

<sup>4</sup> *Cooley*, Const. Lim. 595; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; *Wilson v. McNamie*, 102 U. S. 572, 26 L. ed. 234; *Wilson v. Black Bird Creek Mursh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237.

<sup>5</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Philadelphia & S. M. SS. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

merce between the states, has been sustained upon the ground, either that the particular statute upon its face appeared to have been passed for the purpose of expediting the safe transportation of persons and property, or in the exercise of police powers, which it is more convenient to leave subject to local legislation; such as the building of bridges over inland navigable streams. Where the manifest tendency of enforcing such laws has been, as far as could be foreseen from their terms, to impede the free and expeditious conduct of commerce over interstate lines by land or water, they have been declared repugnant to the organic law, and void, even where Congress had failed to legislate on the branch of the subject to which they relate. The futile attempts by state legislatures either to give exclusive privileges to a particular telegraph company, or to subject telegraph companies generally to such license tax or tax on messages as would imply the right to destroy their business by burdening them with such imposts, illustrates the view that where Congress has not exercised a police power comprehended under the general authority to regulate commerce, the states may exercise the power to aid, but not to impede or obstruct it.<sup>1</sup>

In *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 358, 30 L. ed. 1189, 1 Inters. Com. Rep. 306, Justice Field says: "In these cases, the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the state can impose no impediments to the freedom of that commerce." In *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, Justice Bradley, speaking for the court, says: "We have repeatedly held that so long as Congress does not pass any law to regulate commerce among the several states it thereby indicates that such commerce shall be free and untrammelled."<sup>2</sup> When we come, therefore, to the application of the authorities to a state statute, the question arises at the threshold

<sup>1</sup> *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134.

<sup>2</sup> *Brown v. Houston*, 114 U. S. 631, 29 L. ed. 260.

of the inquiry whether the statute which is drawn in question would, in its enforcement, tend to trammel or obstruct the trade carried on between the states, and not whether it might not remotely influence it.<sup>1</sup> The control of navigable waters constituting channels of communication between states and foreign countries is within the commercial power of Congress;<sup>2</sup> and navigable waters of the United States are those which form by themselves, or by uniting with others, a continuous highway for commerce with other states.<sup>3</sup>

The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end. As said by Chief Justice Marshall, "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states.<sup>4</sup> Congress has likewise the power, exercised early in this century by successive acts in the case of the Cumberland or National Road from the Potomac across the Alleghenies to the Ohio, to

<sup>1</sup> *Bagg v. Wilmington, C. & A. R. Co.* 14 L. R. A. 596, 109 N. C. 279.

<sup>2</sup> *Southern S. S. Co. v. New Orleans Port Wardens*, 73 U. S. 6 Wall. 31, 18 L. ed. 749; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

<sup>3</sup> Cited in *Decker v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 434, 30 Fed. Rep. 723.

<sup>4</sup> *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 411, 422, 4 L. ed. 579, 603, 605; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 861, 873, 6 L. ed. 204, 233, 236; *Union Pac. R. Co. v. Myers* ("Pac. R. Removal Cases") 115 U. S. 1, 18, 29 L. ed. 319, 325; *California v. Central Pac. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153.

authorize the construction of a public highway connecting several states.<sup>1</sup> And whenever it becomes necessary for the accomplishment of any object within the authority of Congress, to exercise the right of eminent domain and take private lands, making just compensation to the owners, Congress may do this with or without a concurrent act of the state in which the lands lie.<sup>2</sup> From these premises the conclusion appears to be inevitable that, although Congress may, if it sees fit and as it has often done, recognize and approve bridges erected by authority of two states across navigable waters between them, it may, at its discretion, use its sovereign powers, directly or through a corporation created for that object, to construct bridges for the accommodation of interstate commerce by land, as it undoubtedly may to improve the navigation of rivers for the convenience of interstate commerce by water.<sup>3</sup> Where states have concurrent powers with Congress, the passage of an Act by Congress, on the subject, suspends prior statutes on that subject enacted by the state, during the continuance of the Congressional Act.<sup>4</sup> Even though a statute be passed in the exercise of the police power, where it comes within the domain of Federal authority, as defined by the Constitution, the latter must prevail.<sup>5</sup> The judicial opinions sometimes cited in support of the opposite view are not, having regard to the facts of the cases in which they were uttered, of controlling weight.

Mr. Justice McLean, indeed, in an opinion delivered by him in the circuit court, by which a bill by the United States to restrain the construction of a bridge across the Mississippi river was

<sup>1</sup> See *Indiana v. United States*, 148 U. S. 148, 37 L. ed. 401.

<sup>2</sup> *Van Brocklin v. Anderson*, 117 U. S. 151, 154, 29 L. ed. 845, 846, and cases cited; *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 656, 34 L. ed. 295, 301.

<sup>3</sup> 1 Hare, Const. Law, 248, 249. See Acts of July 14, 1862, chap. 167 (12 Stat. at L. 569); February 17, 1865, chap. 38 (13 Stat. at L. 431); July 25, 1866, chap. 246 (14 Stat. at L. 244); March 3, 1871, chap. 121, § 5 (16 Stat. at L. 572, 573); June 16, 1886, chap. 417 (24 Stat. at L. 78).

<sup>4</sup> *Boedefeld v. Reed*, 55 Cal. 299; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 196, 4 L. ed. 548; *Van Nostrand v. Carr*, 30 Md. 128, 2 Nat. Bankr. Reg. 155.

<sup>5</sup> *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 210, 6 L. ed. 73; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516.

dismissed, no injury to property of the United States and no substantial obstruction to navigation being shown, and there having been no legislation by Congress upon the subject, took occasion to remark that "neither under the commercial power, nor under the power to establish post roads, can Congress construct a bridge over navigable water;" that "if Congress can construct a bridge over navigable water, under the power to regulate commerce or to establish post roads, on the same principle it may make turn-pike or railroads throughout the entire country;" and that "the latter power has generally been considered as exhausted in the designation of roads on which the mails are to be transported; and the former by the regulation of commerce upon the high seas and upon our rivers and lakes."<sup>1</sup> The same learned justice repeated and enlarged upon that idea in his dissenting opinion in *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 442, 443, 15 L. ed. 435, 442, where, after the Wheeling bridge, constructed across the Ohio river under an act of the state of Virginia, had by a decree of the court, at the suit of the state of Pennsylvania, been declared to be in its then condition an unlawful obstruction of the navigation of the river, and in conflict with the acts of Congress regulating such navigation, and therefore ordered to be elevated or abated, Congress passed an Act, declaring the bridge to be a lawful structure in its then position and elevation, establishing it as a post road for the passage of the mails of the United States, authorizing the corporation to have and maintain the bridge at that cite and elevation, and requiring the captains and crews of all vessels and boats navigating the river to regulate the use thereof, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge.<sup>2</sup> But the majority of the Supreme Court of the United States in that case held that "the Act of Congress afforded full authority to the defendants to reconstruct the bridge." Mr. Justice Nelson, in delivering its opinion, said: "We do not enter upon the question, whether or not Congress possess the power, under the authority in the Constitution

<sup>1</sup> *United States v. Railroad Bridge Co.* 6 McLean, 517, 524, 525.

<sup>2</sup> Act of August 31, 1852, chap. 111, §§ 6, 7 (10 Stat. at L. 112).



to establish postoffices and post roads, to legalize this bridge; for conceding that no such powers can be derived from this clause, it must be admitted that it is, at least necessarily included in the power conferred to regulate commerce among the several states. The regulation of commerce includes intercourse and navigation, and of course, the power to determine what shall or shall not be deemed in judgment of law an obstruction to navigation; and that power, as we have seen, has been exercised consistently with the continuance of the bridge." And Mr. Justice Daniel, in a concurring opinion, sustaining the validity of the Act of Congress, said: "They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues the course of the river, and to that which traverses its channel, and is broadly diffused through the country. They have at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio."<sup>1</sup>

In the cases of *The Passaic Bridges*, 3 Wall. appx. 782, decided by Mr. Justice Grier in the circuit court, and of *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96, and *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921, the bridge in question had been erected under authority of a state and was wholly within the state, and no question arose, or was considered, as to the power of Congress, in regulating interstate commerce, to authorize the erection of bridges between two states. But in *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9, Mr. Justice Bradley, sitting in the circuit court, upheld the constitutionality of the Act of Congress of June 16, 1886, chap. 417, authorizing a corporation of New York and one of New Jersey to build and maintain a bridge, as therein directed across the Staten Island Sound or Arthur Kill.<sup>2</sup> The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards de-

<sup>1</sup> 59 U. S. 18 How. 431, 436, 458, 15 L. ed. 437, 439, 448. A similar decision was made in *Gray v. Chicago, I. & N. R. Co.* ("The Clinton Bridge") 77 U. S. 10 Wall. 454, 19 L. ed. 969. See also *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971.

<sup>2</sup> 24 Stat. at L. 73.

livered by him in behalf of the court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated, as to render further discussion of the subject superfluous. In *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, in which it was held that section 2 of the Act of February 14, 1859, chap. 33 (11 Stat. at L. 383) for the admission of Oregon into the Union, providing that "all the navigable waters of the said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States," did not prevent the state, in the absence of legislation by Congress, from authorizing the erection of a bridge over such a river. Mr. Justice Bradley, speaking for the whole court, said: "And although, until Congress acts, the states have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the states, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexercised) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. It might itself give original authority for the erection of such bridges, when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the state." In *California v. Central Pac. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, it was directly adjudged that Congress has authority, in the exercise of its power to regulate commerce among the several states, to authorize corporations to construct railroads across the states, as well as the territories of the United States; and Mr. Justice Bradley, again speaking for the court, and referring to the acts of Congress establishing corporations to build railroads across the continent, said: "It cannot at the pres-

ent day be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from state to state, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed, and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing states as well as territories, and employing the agency of state as well as Federal corporations." An Act of Congress declares the construction of the North River Bridge between the states of New York and New Jersey to be "in order to facilitate interstate commerce;" and it makes due provision for the condemnation of lands for the construction and maintenance of the bridge and its approaches, and for just compensation to the owners. In the light of the foregoing principles and authorities the court sustained the constitutionality of this Act.<sup>1</sup>

<sup>1</sup> *Luxton v. North River Bridge Co.* 147 U. S. 337, 37 L. ed. 194.

### § 107. *State Regulations Affecting Common Carriers.*

The power of Congress over commerce between the states and the corresponding power of individual states over such commerce have been the subject of such frequent adjudication in the United States Supreme Court, and the relative powers of Congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarkation between the powers belonging exclusively to Congress, and those in which the action of the state may be concurrent. The adjudications of the court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls for the use of the same,<sup>1</sup> and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the state—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries.<sup>2</sup> This is true notwithstanding the fact that the goods or passengers carried or traveling over such highway be-

<sup>1</sup> *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 456, 22 L. ed. 678.

<sup>2</sup> *Veazie v. Moor*, 55 U. S. 14 How. 568, 14 L. ed. 545; *United States v. The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191, 87 U. S. 20 Wall. 430, 22 L. ed. 391.

tween points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter.<sup>1</sup>

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the states;<sup>2</sup> nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a state.<sup>3</sup> The remarks of the Chief Justice in this case contain the substance of the whole doctrine: "Over this" (the internal) "commerce and trade, Congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States.<sup>4</sup> But later adjudications have ignored this distinction as applied to those waters.<sup>5</sup>

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on.<sup>6</sup>

<sup>1</sup> *Society for Savings v. Coite*, 73 U. S. 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings v. Massachusetts*, 73 U. S. 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. 6 Wall. 632, 18 L. ed. 904; *Baltimore & O. R. Co. v. Maryland*, 83 U. S. 21 Wall. 456, 22 L. ed. 678; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773.

<sup>2</sup> *United States v. De Witt*, 76 U. S. 9 Wall. 41, 19 L. ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115.

<sup>3</sup> *License Tax Cases*, 72 U. S. 5 Wall. 462, 18 L. ed. 497.

<sup>4</sup> *Allen v. Newberry*, 62 U. S. 21 How. 244, 16 L. ed. 110.

<sup>5</sup> *The Belfast v. Boon*, 74 U. S. 7 Wall. 634, 641, 19 L. ed. 266, 271; *Rodd v. Hearitt* ("The Lottawanna"), 88 U. S. 21 Wall. 558, 587, 22 L. ed. 654, 665; *Lord v. Goodall, N. & P. SS. Co.* 102 U. S. 541, 26 L. ed. 224.

<sup>6</sup> *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550.

Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots;<sup>1</sup> quarantine and inspection laws and the policing of harbors;<sup>2</sup> the improvement of navigable channels;<sup>3</sup> the regulation of wharfs, piers, and docks;<sup>4</sup> the construction of dams and bridges across the navigable waters of a state,<sup>5</sup> and the establishment of ferries.<sup>6</sup>

Of this class of cases it was said by Mr. Justice Curtis :<sup>7</sup> “If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution, and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of Congressional regulations.”<sup>8</sup>

<sup>1</sup> *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Pacific Mail SS. Co. v. Joliffe*, 69 U. S. 2 Wall. 450, 17 L. ed. 805; *Ex parte McNeil*, 80 U. S. 13 Wall. 236, 20 L. ed. 624; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234.

<sup>2</sup> *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 203, 6 L. ed. 23, 71; *New York v. Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648; *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237.

<sup>3</sup> *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487.

<sup>4</sup> *Cannon v. New Orleans*, 87 U. S. 20 Wall. 577, 22 L. ed. 417; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Pittsburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584; *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379.

<sup>5</sup> *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525.

<sup>6</sup> *Conway v. Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191.

<sup>7</sup> *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 318, 13 L. ed. 996, 1004.

<sup>8</sup> See also *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 192, 193, 4 L. ed. 547, 548.

But even in the matter of building a bridge, if Congress chooses to act, its acting necessarily supersedes the action of the state.<sup>1</sup> As matter of fact, the building of bridges over waters dividing two states is now usually done by Congressional sanction. Under this power the states may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class—of those laws wherein the jurisdiction of Congress is exclusive.<sup>2</sup> Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states. That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 73 U. S. 6 Wall. 35, 18 L. ed. 745, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for

<sup>1</sup> *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 435.

<sup>2</sup> *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the Chief Justice in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce than the dray or the cart by which but for them grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may operate upon commerce outside its immediate jurisdiction."<sup>1</sup>

In the next case, viz, that of the *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94, was a bill filed by the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington &

<sup>1</sup> The principle of this case has been recently affirmed in *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, and reaffirmed in *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, though not without strong opposition from a minority of the court.



Missouri Railroad in Iowa, the two roads being connected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Platsmouth on the Mississippi river, in Iowa. The case was held to be covered by *Munn v. Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. "Its business," said the Chief Justice, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without, may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz, *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97, it was held that under the constitution of Wisconsin, providing that all acts creating corporations within the state "may be altered or repealed by the legislature at any time after their passage," the legislature had a right to prescribe a maximum of charges to be made by the Chicago & Northwestern Railway Company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. The vital question is not discussed at any length, but it was held that, until Congress acted with reference to the relations of this company to interstate commerce, it was within the power of the state of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812, in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547, which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the states to give all persons traveling within that state, upon vessels employed in such business, equal rights and privileges in

parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In *Stone v. Farmers Loan & T. Co.* ("Railroad Commission Cases") 116 U. S. 307, 29 L. ed. 636, it was held that the right of a state to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which granted to a railroad company the right from time to time to fix and regulate the tolls and charges by them to be received for transportation did not deprive the state of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the state might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. . . . The commission is in express terms prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of property taken up without the state and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in the *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, in which there came under review a statute of Illinois enacting that if any railroad company should, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that

case made such discrimination in regard to goods transported over the same road or roads, from Peoria, Illinois, and from Gilman, in Illinois, to New York; charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer the city of New York than the latter, this difference being in the length of line in the state of Illinois. The court held that such transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois, and that the regulation of such commerce was confided to Congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by Congress. In delivering the opinion of the court Mr. Justice Miller cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce, which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by Congress upon the same subject. He further observed that "the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others; and the case of *Munn v. Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business of Chicago, . . . free from the question of continuous transportation through the several states, . . . and the question how far a charge made for a continuous transportation over several states, which included a state whose laws were in question, may be divided into separate charges for each state, in enforcing the power of the states to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be

considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered as overruled.<sup>1</sup> In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the Wabash case, and to that doctrine the Supreme Court of the United States still adheres.<sup>2</sup>

The real question involved in the case last cited, is whether the case had been distinguished from the Wabash case. That involved the right of a single state to fix the charge for transportation from the interior of such state to places in other states. The case the court last considered involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The first question is answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, in which the state of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey, and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that state. "Congress alone," said the court (p. 204) "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its

<sup>1</sup> See also *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

<sup>2</sup> *The Corington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, decided May 26, 1894.

own interests and products and against those of other states." If, as was intimated in that case, interstate commerce means simply commerce between the states, the courts declare, that it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line—in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons which influenced the court to hold in the *Wabash* case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same, and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferry boat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, it is said, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 189, 6 L. ed. 23, 68, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two states are not instruments of commerce between such states in such

sense as to exempt them from state control. In *Conway v. Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the Constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But there is no citation of any case in the United States Supreme Court where such right has been recognized. Of recent years it has been the custom to obtain the consent of Congress for the construction of bridges over navigable waters, and by the seventh section of the Act of September 19, 1890 (26 Stat. at L. 426, 454) it is made unlawful to begin the construction of any bridge over navigable waters, until the location and plan of such bridge have been approved by the Secretary of War, who has also been in frequent instances authorized to regulate the tolls upon such bridges, where they connected two states. So, too, in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, it was held that a state had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the state, for boats which they owned and used in conveying from a landing in the state passengers and goods across a navigable river to another

state. It was said that, "the levying of a tax upon vessels or other watercraft, or the exaction of a license fee by the state within which the property subject to the exaction has its *situs*, is not a regulation of commerce within the meaning of the Constitution of the United States." Obviously the case does not touch the question involved.<sup>1</sup> Upon the other hand, however, it was held in *Moran v. New Orleans*, 112 U. S. 69, 18 L. ed. 653, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the state of Kentucky, by the statute in question,\* attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and

<sup>1</sup> *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 304, 38 L. ed. 962.

\* NOTE.—On March 31, 1890, the legislature of Kentucky passed an act amendatory of the act of incorporation, providing that it should be unlawful for any person or corporation to charge, collect, demand or receive for passage over the bridge spanning the Ohio river, constructed under such act of incorporation, any toll, fare or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation. The second section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and by the third section, the company was required to keep an office within the county of Kenton constantly open for the sale of such tickets; and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

separate tariffs may be adopted by each state (if the subject be one for state regulation) and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability for controversies of a serious nature. For instance, suppose the agent of the bridge company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky, who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low and the charge for



merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

The United States Supreme Court decline to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always, it is said, an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382: "freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of Congress." Nor is the Supreme Court to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

It does hold, however, that the statute of the commonwealth of Kentucky is an attempted regulation of commerce which it is not within the power of the state to make. As was said by Mr. Justice Miller in the *Wabash* case: "It is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation."

The principle of the decisions of the Supreme Court, affirm the

right of a state, in the absence of regulation by Congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce.<sup>1</sup> Wharfage is subject to local state laws, Congress having passed no Act to regulate it. Charges for wharfage graduated by tonnage of vessels using wharf are not open to objection that they are duties on tonnage within meaning of Constitution. Where wharfage charges are reasonable it in no way concerns those who pay them what application is made of the proceeds. The appropriation of wharfage charges to maintain, extend, light and police the wharves is unobjectionable, although profits may be realized by lessees from the city which owns them.<sup>2</sup> The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the states respectively.<sup>3</sup> A statute prohibiting the shipment out of the state of oysters taken in the public waters of the state, while they are in shells, and which also prohibits the taking of such oysters by any person who is not a resident of the state, is not unconstitutional as a regulation of interstate commerce.<sup>4</sup>

The grant to Congress of the power to regulate commerce among the states does not embrace that commerce which is completely internal or between different parts of the same state. In the carriage of freight and passengers between two points in one state, the mere passage over soil of another state, does not render that business foreign, which is otherwise domestic.<sup>5</sup> The act of a railroad company in carrying coal from one point in Texas to another is not within the scope of interstate commerce regulations, although such coal was originally shipped from another territory, where such carrier receives it without any understanding or arrangement, express or implied, that it shall become a link in

<sup>1</sup> *Onachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382.

<sup>2</sup> *Onachita & M. R. Packet Co. v. Aiken*, *supra*.

<sup>3</sup> *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565.

<sup>4</sup> *State v. Harrub* (Ala.) 4 Inters. Com. Rep. 99, 15 L. R. A. 761.

<sup>5</sup> *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87.

a chain of transportation from points outside the state.<sup>1</sup> Laws passed by the individual states, under their general authority over internal concerns, may incidentally affect foreign and interstate commerce without conflicting with the Constitution of the United States, provided they do not discriminate against such commerce and are not inconsistent with the acts of Congress.<sup>2</sup> A contract for interstate shipment does not come within a state law regulating rates, because made in that state, so that such law will introduce a new term into the contract, but its utmost effect would be to forbid a contract for an unreasonable rate and make the contract unlawful, leaving the transaction open to adjustment under the laws of the United States.<sup>3</sup> There is a commerce wholly within the state, which is not subject to the constitutional provision, and a distinction between commerce among states and between the citizens of a single state, conducted within its limits.<sup>4</sup> A statute making the owner of Texas cattle which have not been wintered north liable for any damages from allowing them to run at large and to spread Texas fever, does not conflict with the paramount authority of Congress to regulate interstate commerce.<sup>5</sup> Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change. The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the length of their lines. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.<sup>6</sup> The charter of a company is not a contract, the obligation of which is impaired by the Mississippi

<sup>1</sup> *Ft. Worth & D. C. R. Co. v. Whitehead*, 6 Tex. Civ. App. 595.

<sup>2</sup> *State v. Newton*, 2 Inters. Com. Rep. 63, 50 N. J. L. 534.

<sup>3</sup> *Swift v. Philadelphia & R. R. Co.* (C. C. N. D. Ill.) 58 Fed. Rep. 858.

<sup>4</sup> *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801.

<sup>5</sup> *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407.

<sup>6</sup> *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56.

statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination, and enforce certain police regulations affecting railroad companies doing business in that state.<sup>1</sup> A state has the right to prohibit and interfere with a contract in restraint of competition, some of the parties to which are corporations created by the state, although it regulates charges upon freight carried to and fro between Texas and other states.<sup>2</sup> An act prohibiting greater charge than specified in bill of lading, and imposing a penalty for refusal to deliver on payment or tender of charges as shown in such bill, is within police power of a state.<sup>3</sup> But a state cannot, under cover of exerting its police powers, substantially prohibit or burden interstate commerce.<sup>4</sup>

In later cases<sup>5</sup> most of the former decisions involving the same principle are cited and referred to. The first of these was a case of wharfage; the second, one of quarantine; and the third, that of a lock in Illinois river constructed by the state of Illinois in aid of navigation. The same principle was applied and enforced in the cases of *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996, on the subject of pilotage; in *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238, where a state law provided for the improvement of the river and harbor of Mobile; in the various cases of bridges over navigable rivers which have come before that court, and which are reviewed and approved in *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; and in *Turner v. Maryland*, 107 U. S. 38, 27 L. ed. 370, which related to the inspection of tobacco. The same principle

<sup>1</sup> *Stone v. Farmers Loan & T. Co.* ("Railroad Commission Cases") 116 U. S. 307, 29 L. ed. 636.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 2 Inters. Com. Rep. 335, 1 L. R. A. 849.

<sup>3</sup> *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291, 1 Inters. Com. Rep. 580.

<sup>4</sup> *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823.

<sup>5</sup> *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 534; *Morgan's L. & T. R. & S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237, and *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487.

was reaffirmed, with the limitations to which its application is subject, in the recent case of *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 493, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45. In all such cases of local concern, though incidentally affecting commerce, it held that the courts of the United States cannot, as such, interfere with the regulations made by the state, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. If, in any case of this character, the courts of the United States can interfere in advance of Congressional legislation, it is (as was said in *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health, supra*) where there is a manifest purpose, "by roundabout means, to invade the dominion of Federal authority." Wharfage is governed by the local state laws; no Act of Congress has been passed to regulate it. By the state laws it is generally required to be reasonable; and by those laws its reasonableness must be judged. If it does not violate them, the United States courts cannot interfere to prevent its exaction. Of course, neither the state, nor any municipal corporation acting under its authority, can lay duties of tonnage; for that is expressly forbidden by the Constitution.

But charges for wharfage may, as we have seen, be graduated by the tonnage of vessels using a wharf; and that this is not a duty of tonnage, within the meaning of the Constitution, has been distinctly held in several cases; among others, in those of *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Cincinnati, P. B. S. & P. Packet Co. v. Cutlettsburg*, 105 U. S. 559, 26 L. ed. 1169; and *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584. And being wharfage, and nothing else, if the charges are unreasonable, remedy must be sought by invoking the laws of the state. If the state laws furnish no remedy (in other words, if the charges are sanctioned by them) then it is for Congress, and not the United

States courts, to regulate the matter, and provide a proper remedy. Such an interposition may become necessary; for although the imposition of unreasonable wharfage by a city or a state is always the dictate of a suicidal policy, the temptation of immediate advantage under stringent pressure will often lead to its adoption. What measures Congress might adopt for the purpose of preventing abuses in this and like matters, is for it to determine. It is possible that a law declaring that wharfage shall be reasonable, and not oppressive, would answer the purpose. It would then be in the power of the Federal courts to inquire and determine as to the reasonableness of the charges actually imposed. That no such inquiry, except in the administration of the state law, can be instituted, as the law now stands, is shown in some of the cases. In *Parkersburg & O. R. Transp. Co. v. Parkersburg*, *supra*, it said: "It is an undoubted rule, of universal application, that wharfage for the use of all public wharves must be reasonable. But then the question arises, By what law is this rule established, and by what law can it be enforced? By what law is it to be decided whether the charges imposed are, or are not, exorbitant? There can be but one answer to these questions: Clearly it must be by the local municipal law, at least until some superior or paramount law has been prescribed. The courts of the United states do not enforce the common law in municipal matters in the state because it is Federal law, but because it is the law of the state."<sup>1</sup> A statute regulating mode in which messages sent by telegraph companies, doing business in that state, shall be delivered in other states is void.<sup>2</sup> A state tax upon sleeping cars of a company, used in carrying passengers into and out of the state, is void as a regulation of interstate commerce.<sup>3</sup> A state legislature has no

<sup>1</sup> *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

<sup>2</sup> *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31.

<sup>3</sup> *State v. Woodruff Sleeping & Parlor Coach Co.* 114 Ind. 155, 1 Inters. Com. Rep. 798; *Wabash, St. L. & P. R. Co. v. Illinois*, *supra*.

power to prohibit the conducting of natural gas from points within to points without the state.<sup>1</sup> Goods brought into a state for sale, although they become thereby a part of the mass of its property, cannot be taxed by reason of their introduction into the state or because they are products of another state.<sup>2</sup> But a sale of the contents merely of the packages in which liquor was imported into the state, the purchaser being required to open them and empty the liquor into glasses furnished by the seller, is not a sale by original packages, exempt as interstate commerce from the operations of state laws regulating the sale of intoxicating liquors.<sup>3</sup>

A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in *Sherlock v. Alling*, 93 U. S. 99, 102, 23 L. ed. 819, 820. If it is competent for the state thus to administer justice according to its own laws for wrongs done and injuries suffered, when committed and inflicted by defendants while engaged in the business of interstate or foreign commerce, notwithstanding the power over those subjects conferred upon Congress by the Constitution, what is there to forbid the state, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been

<sup>1</sup> *State v. Indiana & O. Oil, G. & Min. Co.* 120 Ind. 575, 2 Inters. Com. Rep. 758, 6 L. R. A. 579.

<sup>2</sup> *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308.

<sup>3</sup> *Hopkins v. Lewis*, 15 L. R. A. 397, 4 Inters. Com. Rep. 63, 84 Iowa, 690.

inflicted, it is admitted the state has power to redress and punish? If the state has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the state also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier, in order to insure the convenience of the public and safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?<sup>1</sup> Thus, a statute requiring each railroad within a state to cause three of its regular passenger trains each way to stop at all stations, cities or villages having more than a designated number of inhabitants, is not invalid as applied to a railroad company having but one train each way, not engaged in interstate commerce, as a regulation of commerce between the states.<sup>2</sup> But the duty of a railroad company operating its own road or a road that it controls, to serve the local stations on its line, does not apply to a company that has only a running privilege for through trains to reach points on its own line over a part of the road of another company which it does not control.<sup>3</sup>

A classification of railroads for establishing rates is not void simply because it operates unequally upon different roads and a reasonable classification of railroads for determining rates is not prohibited by the constitutional provision that no person shall be deprived of property without due process of law. Under a constitutional provision that the legislature may from time to time establish reasonable maximum rates of charges for the transportation of passengers and freight on different railroads, the reasonableness of the rates is exclusively for the legislature. It may

<sup>1</sup> *Ouachita & M. R. Packet Co. v. Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379.

<sup>2</sup> *Lake Shore & M. S. R. Co. v. State*, 8 Ohio C. C. 220.

<sup>3</sup> *Alford v. Chicago, R. I. & P. R. Co.* 2 Inters. Com. Rep. 771.



make reasonable distinctions as to the charges to be made by railroads in different portions of the state, and also classify different roads upon the basis of their gross earnings, and a classification of railroads for the purpose of establishing rates is not unfair or unreasonable because based on the amount of business done per mile.<sup>1</sup> The justice of a statute limiting rates of transportation must be determined with reference to its effect on the whole of a class of railroads, where they are classified by the statute, and not with reference to one particular road. Part only of the line of a railroad company cannot be taken separately in testing the justice of a statute regulating rates of transportation. A foreign corporation which comes into the state to operate a railroad thereby undertakes and becomes bound to do it according to the terms and conditions imposed by the constitution and laws of the state upon domestic corporations, in respect to regulation of its rates. A railroad is not exempt from state regulations of its rates by the fact that it has been declared a post and military route and national highway by acts of Congress which granted to it lands for a right of way.<sup>2</sup>

A ferry is a means of commercial intercourse between states, bordering upon dividing waters, and it must be conducted without imposition by states of taxes or other burdens upon the commerce between them. The power of the states to regulate matters of internal police includes the establishment of ferries as well as the construction of roads and bridges. In *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 203, 6 L. ed. 71, Chief Justice Marshall said that laws respecting ferries, as well as inspection laws, quarantine laws, health laws, regulating the internal commerce of the states, are component parts of an immense mass of legislation, embracing everything within the limits of a state not surrendered to the general government; but in this language he plainly refers to ferries entirely within the state, and not to ferries transporting passengers and freight between the states and a foreign country; for the power vested in Congress, he says, comprehends every species of commercial intercourse between the United States and

<sup>1</sup> *Wellman v. Chicago & G. T. R. Co.* 83 Mich. 592.

<sup>2</sup> *St. Louis & S. F. R. Co. v. Gill*, 11 L. R. A. 452, 54 Ark. 101.

foreign countries. No sort of trade, he adds, can be carried on between this country and another to which the power does not extend; and what is true of foreign commerce is also true of commerce between states over the waters separating them. Ferries between one of the states and a foreign country cannot be deemed, therefore, beyond the control of Congress under the commercial power. They are necessarily governed by its legislation on the importation and exportation of merchandise and immigration of foreigners—that is, are subject to its regulation in that respect; and if they are not beyond the control of the commercial power of Congress, neither are ferries over waters separating states. Congress has passed various laws respecting such international and interstate ferries, the validity of which is not open to question. It has provided that vessels used exclusively as ferry boats, carrying passengers, baggage and merchandise, shall not be required to enter and clear, nor shall their masters be required to present manifests, or to pay entrance or clearance fees, or fees for receiving or certifying manifests; “but they shall, upon arrival in the United States, be required to report such baggage and merchandise to the proper officer of the customs, according to law.”<sup>1</sup> That the lights for ferry boats shall be regulated by such rules as the board of supervising inspectors of steam vessels shall prescribe;<sup>2</sup> that any foreign railroad company or corporation whose road enters the United States by means of a ferry or tug boat, may own such boat, and that it shall be subject to no other or different restrictions or regulations in such employment than if owned by a citizen of the United States;<sup>3</sup> that the hull and boilers of every ferry boat propelled by steam shall be inspected, and provisions of law for the better security of life, which may be applicable to them, shall, by regulations of the supervising inspectors, be required to be complied with before a certificate of inspection be granted; and that they shall not be navigated without a licensed engineer and a licensed pilot.<sup>4</sup>

<sup>1</sup> Rev. Stat. § 2792.

<sup>2</sup> Rev. Stat. § 4233, Rule 7.

<sup>3</sup> Rev. Stat. § 4370.

<sup>4</sup> Rev. Stat. § 4426.

It is true that from the earliest period in the history of the government the states have authorized and regulated ferries not only over waters entirely within their limits, but over waters separating them; and it may be conceded that in many respects the states can more advantageously manage such interstate ferries than the general government; and that the privilege of keeping a ferry, with a right to take toll for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, comfort and convenience of the public. Still, the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the states bordering on their dividing waters; and it must therefore be conducted without the imposition by the states of taxes or other burdens upon the commerce between them. Freedom from such imposition does not of course imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property either on water or land are not an interference with the freedom of transportation between the states secured under the commercial power of Congress.<sup>1</sup> That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property. How conflicting legislation of two states on the subject of ferries on waters dividing them is to be met and treated is a question for consideration of the courts. Pennsylvania has never attempted to exercise its power of establishing and regulating ferries across the Delaware river. Any one, so far as her laws are concerned, is free to establish such ferries as he may choose. No license fee is exacted from ferry keepers. She merely exercises

<sup>1</sup> *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Northwestern U. Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1170; *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584.

the right to designate the places of landing as she does the places of landing for all vessels engaged in commerce, and however great the power of a state no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on.<sup>1</sup>

The legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over these matters, subject to the limitation that the carriage is not required without reward or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce.<sup>2</sup> Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters, or unless what is done amounts to a regulation of foreign or interstate commerce.<sup>3</sup> Where the charter of a railroad corporation grants to it the power to establish such rates of toll for the conveyance of persons and property as it shall from time to time direct and determine, subsequent legislation to prevent extortion and unjust discrimination in railroads is constitutional, and not in violation of the charter contract.<sup>4</sup> Where maximum rates are fixed by statute, the intention of the legislature is to confer upon the railroad company the right to charge as a common carrier for freight, not by any unit of distance but to fix a maximum beyond which the company cannot

<sup>1</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382.

<sup>2</sup> *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 58.

<sup>3</sup> *Dow v. Beidelman*, *supra*; *Stone v. Farmers Loan & T. Co.* ("Railroad Commission Cases") 116 U. S. 307, 29 L. ed. 636; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Ruggles v. Illinois*, 108 U. S. 536, 27 L. ed. 816; *Illinois Cent. R. Co. v. Illinois*, 108 U. S. 541, 27 L. ed. 818.

<sup>4</sup> *Illinois Cent. R. Co. v. People*, 95 Ill. 313, 108 U. S. 541, 27 L. ed. 818; *Blake v. Winona & St. P. R. Co.* 19 Minn. 418, 18 Am. Rep. 345; *Ruggles v. Illinois*, *supra*.

go and to leave the tariff of charges, within that limit, to the company,—subject to the rule of common law, that the charges should be reasonable, and to the regulating power of the courts and the legislature.<sup>1</sup>

The limitation upon the amount of the reduction by the legislature of railway transportation rates, in Ohio act Feb. 11, 1848, § 12, that it shall not reduce the future probable profits below the ten per cent therein specified, does not make it a condition to the validity of the reduction that the future profits shall in fact equal that sum; and a subsequent change in a railway company's affairs will not take it out of the operation of such reduction, which was authorized and applicable to it when the act was passed. The capital stock of a railway company, exclusive of the accumulated profits retained in its business, is meant by the phrase "its capital." in Ohio act Feb. 11, 1848, § 12, authorizing the legislature to prescribe transportation rates, but providing that no reduction shall be made unless the average net profits for the previous ten years shall equal ten per cent per annum of its capital.<sup>2</sup> The power of a state to limit railroad charges for transportation can only be bargained away, if at all, by words of positive grant or their equivalent.<sup>3</sup> A railroad company succeeding to the rights and privileges of another company, whose charter provides that it shall be subject to all the laws of the commonwealth which apply to railway corporations generally, is subject to the provisions of an act fixing toll and rates for railroads on which different rates are not prescribed by law, and succeeds to the right to operate the road subject, as to the regulation of its tolls, to the general laws, and cannot claim the benefit of toll provisions in the charter of its predecessor, on the ground that they constituted contract obligations to which it succeeded.<sup>4</sup> A railroad extending through several states is an entirety within each and is subject to the jurisdiction of courts in either state in

<sup>1</sup> *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684.

<sup>2</sup> *Iron R. Co. v. Lawrence Furnace Co.* 49 Ohio St. 102.

<sup>3</sup> *Stone v. Farmers Loan & T. Co.* ("Railway Commission Cases") 116 U. S. 307, 29 L. ed. 636.

<sup>4</sup> *Norfolk & W. R. Co. v. Pendleton*, 86 Va. 1004.

an action to prevent discriminations in rates of freight.<sup>1</sup> The power to regulate a carrier's rates is not a power to destroy, and limitation is not the equivalent of confiscation.<sup>2</sup> General statutes fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not deny to the railroad companies the equal protection of the laws, or deprive them of their property without due process of law, within the meaning of the 14th Amendment.<sup>3</sup> A power of government which actually exists is not lost by non-user.<sup>4</sup> The regulation of matters of this kind, says the court, is legislative in its character, not judicial.<sup>5</sup> But the government may appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of these courts to remove or restrain such obstructions.<sup>6</sup>

The legislature in most states has reserved, in the general act for the formation of railroad companies, the right to regulate the question of freights.<sup>7</sup> Under the Arkansas act of March 24, 1887, imposing a penalty upon a carrier violating either or several of its provisions, a carrier is liable to the penalty upon violation of any one of such provisions.<sup>8</sup> The organization of a railroad company under the laws of Arkansas is subject to the state's reserved right to alter the law then in force as to the maximum rate of charges of such companies.<sup>9</sup> The police power may protect business interests by prohibiting discriminations, by regulating tariffs, by enforcing facilities for the public. The Inter-

<sup>1</sup> *Providence Coal Co. v. Providence & W. R. Co.* 15 R. I. 303.

<sup>2</sup> *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209.

<sup>3</sup> *Stone v. Farmer's Loan & T. Co.* ("Railway Commission Cases"), 116 U. S. 307, 29 L. ed. 636.

<sup>4</sup> *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94.

<sup>5</sup> *Memphis & L. R. R. Co. v. Southern Exp. Co.* 117 U. S. 1, 29 L. ed. 791; *Delaware, L. & W. R. Co. v. Central Stock Yard & T. Co.* 43 N. J. Eq. 81.

<sup>6</sup> *Re Debs*, 158 U. S. —, 39 L. ed. —.

<sup>7</sup> Laws, 1850, chap. 140, § 27, subd. 9; *Kilmer v. New York Cent. & H. R. R. Co.* 100 N. Y. 395.

<sup>8</sup> *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65.

<sup>9</sup> *St. Louis & S. F. R. Co. v. Ryan*, 56 Ark. 245.

state Commerce Act of Congress illustrates this proposition.<sup>1</sup> Because individuals may serve for hire, or may, without compensation, donate their services, it does not follow that common carriers by rail may do the same thing. Although the company owns the property, it is also in the enjoyment of a public franchise; and in the control of the property it has not the same measure of power that persons have and exercise over property that is affected by no public use, and operated without the exercise of any public franchise.<sup>2</sup> An act prohibiting greater charge by carrier for transportation of freight than specified in the bill of lading, and imposing a penalty for refusal to deliver on payment or tender of charges as shown in such bill, is not special legislation, or a regulation upon interstate commerce, but is within the police power of the state.<sup>3</sup> A state board of transportation is clothed with power to determine what is a just and reasonable charge on all the lines of railway within the state; and this may be done in advance of the rendition of the service.<sup>4</sup> A railroad company is not compelled to enter involuntarily into contract relations with other companies, by a statute requiring the adoption of joint rates, or, in default thereof, the fixing of such rates by railroad commissioners, as in the latter case the obligation of the company as to the rates is one imposed by law, and not by contract. The power to establish joint "through rates" for connecting carriers is included within the power of the state to regulate rates of charges for transportation of freight by railroads.<sup>5</sup>

The legislature has power to fix the rates for railroad charges for transportation, and the extent of judicial interference is protection against unreasonable rates.<sup>6</sup> But a state statute imposing a penalty upon a carrier for charging more for a shorter than for

<sup>1</sup> *Boston & M. R. Co. v. York County Comrs.* 79 Me. 386.

<sup>2</sup> *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 57.

<sup>3</sup> *Little Rock & Ft. S. R. Co. v. Hanniford*, 1 Inters. Com. Rep. 580, 49 Ark. 291.

<sup>4</sup> *State v. Fremont, E. & M. V. R. Co.* 22 Neb. 313.

<sup>5</sup> *Burlington, C. R. & N. R. Co. v. Dey*, 12 L. R. A. 436, 82 Iowa, 312.

<sup>6</sup> *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176; *Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209.

a longer distance, is void as applied to cases of shipment from points in the state to point without, even as to that portion of the transit wholly within the state.<sup>1</sup> State tax upon gross receipts of railroads for carriage of freight or passengers into, out of or through state, is void.<sup>2</sup> A state tax upon interstate commerce is void.<sup>3</sup> It makes no difference whether such commerce is carried on by individuals or corporations.<sup>4</sup> A state statute regulating the rights of carriers and declaring what rates shall be regarded as extortionate does not apply to the case of interstate shipments.<sup>5</sup>

A state statute disqualifying persons who are color blind from certain service on railroads, and providing for their examination and imposing a fine upon any company employing any person for such service without a certificate from examiners, is not invalid as a regulation of commerce or as depriving any person of property without due process of law.<sup>6</sup> Requiring a railroad company to pay fees for examining persons for certain railroad service does not deprive them of property without due process of law.<sup>7</sup> In *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, it is said that this question was not and could not be raised and hence was not authoritatively decided and that so much of the Alabama act of February, 1887, as attempts to impose on railroad corporations, without their consent, the expense of the examination and certification of the qualification of their employes in respect to color blindness

<sup>1</sup> *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; 1 Inters. Com. Rep. 31.

<sup>2</sup> *Fargo v. Stevens*, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51.

<sup>3</sup> *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45; *Fargo v. Stevens*, *supra*; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 307; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Riddle v. Baltimore & O. R. Co.* 1 Inters. Com. Rep. 779, 800; *Re Hennick*, 1 Inters. Com. Rep. 66, 5 Mackey, 489.

<sup>4</sup> *State v. Woodruff Sleeping & Parlor Coach Co.* 1 Inters. Com. Rep. 801, 114 Ind. 155.

<sup>5</sup> *Mobile & O. R. Co. v. Dismukes*, 4 Inters. Com. Rep. 200, 17 L. R. A. 113, 94 Ala. 131.

<sup>6</sup> *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, affirming 83 Ala. 71; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

<sup>7</sup> *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, *note*.



rather than on the employe, is unconstitutional and void as a deprivation of property without due process of law.<sup>1</sup> It is the state law which decides who are or may be common carriers, and prescribes the means they shall adopt for the safety of that which is committed to their charge, and the rules according to which, under varying conditions, their conduct shall be measured and judged; which declares that the common carrier owes the duty of care, and what shall constitute that negligence for which he shall be responsible. But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject.<sup>2</sup>

### § 108. *Interstate Commerce Commission—Jurisdiction and Practice.*

In the exercise of its Constitutional power Congress passed an Act to Regulate Commerce, and created an Interstate Commerce Commission, to enforce with the aid of the United States courts, the provisions of this law. The detailed purposes of the Act have

<sup>1</sup> *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619.

<sup>2</sup> *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

been stated in *Negligence of Imposed Duties, Passenger Carriers*, sections 136, 137, pp. 489, 490, the law to regulate commerce was intended to secure to persons needing transportation service the nearest possible approximation to equal treatment, and that where there exists in the costs or conditions of the service sufficient reason therefor, the carriers may rightfully establish and maintain carload and less than carload rates, but where the carriers themselves make one uniform rate per hundred pounds, if such act on the part of the carrier is warranted by the conditions, a nearer approach is made to perfect equality than could be made in any other way and the commission should interpose no objection. But when the conditions of the service are so marked and distinct as to bring about an unjust discrimination or a preference by the maintenance of such uniform rate, then there would be a departure from the equality of treatment which seems to be one of the principal results sought for by the law.<sup>1</sup>

The Act to Regulate Commerce makes it the duty of the Interstate Commerce Commission to execute and enforce the provisions of the Act which require rates and charges to be reasonable. In the performance of this duty the commission has authority to inquire into the management of the business of common carriers and, to require the attendance and testimony of witnesses, the production of books and papers, tariffs and contracts relating to any matter under investigation. To enforce its authority in this respect the commission must invoke the aid of a court of the United States. When applied to by petition the commission must investigate matters complained of and must, to enforce the Act, make investigations and prosecute inquiries instituted on its own motion. On making any investigation, the commission is required to make a report in writing of its recommendations, conclusions and the findings of fact on which its conclusions are based, which recommendations and conclusions, if not complied with, can only be enforced through the courts, after trial, in accordance with established procedure. In such trial the facts found by the commission, in conformity with the statute,

<sup>1</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

have legal effect and are prima facie evidence, but the recommendations, conclusions and orders of the commission are of no binding force in the courts. The commission having entered upon inquiry and investigation as to the reasonableness of transportation rates on food products and given notice of the time and place of taking testimony and afforded opportunity for calling and cross-examination of witnesses, such proceeding was held to be a substantial compliance with the statute.<sup>1</sup> When a carrier fails to answer a complaint filed under section 13 of the Act to Regulate Commerce, the Commission will take such proof of the facts as may be deemed proper and reasonable, and make such order thereon as the circumstances of the case appear to require.<sup>2</sup>

At the request of the Senate Committee on Finance the commission directed its auditor to collect statistics showing changes in rates from the earliest period for which it was possible to obtain data to the present time. These statistics, included in the report of that committee to Congress on the subject of prices and wages, show a material decline in rates, and classifications prescribing rates, which appears universal, and the minimum has not yet been reached, it seems. The late opinion of Justice Brewer in the circuit court of appeals, deciding a long and short haul case, and the statement in the opinion, that the total joint rate of two roads is over an independent line from lines formed by either road, and not to be considered in determining the local rate of either road, and, therefore, may be even less than the intermediate or local rate, is disputed by the commission as *obiter*. Congress is urged to take such immediate action as will give legislative construction to the word "line" in the statute. Several amendments recommended by the commission for the purpose of strengthening the law are discussed in the 6th Annual Report, especially those growing out of the decision of the Supreme Court, that the provisions of section 860 of the Revised Statutes granting immunity to witnesses required to testify concerning illegal acts in which they have

<sup>1</sup> *Re Alleged Excessive Freight Rates and Charges on Food Products*, 3 Inters. Com. Rep. 151.

<sup>2</sup> *The Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.* 4 Inters. Com. Rep. 318.

participated are not broad enough to meet the safeguards guaranteed to such a witness by the Constitution, and the more recent decision of the United States circuit court, that Congress cannot constitutionally require the Federal courts to use their process to compel the production of testimony before a non-judicial tribunal. Regarding the proposed amendment by which pooling is to be permitted the report says: "The attempt to secure the public from discrimination, extortion, favoritism, undue preference, and to secure to every citizen just and reasonable rates and equal and exact treatment in all transportation matters is the very essence, spirit, and purpose of the law, and it would be vain to protect carriers from competitive attacks upon each other if the general public cannot be protected from the greater evils above enumerated. If the law is to be amended the two classes of amendments should go hand in hand. Until the law is made strong, as its framers intended, in the matters of fair and stable rates, equal treatment, and suppression of all favoritism, it is idle to seek to protect carriers, whose immunity under the authoritative constructions of the law from restrictions intended by Congress, seems one of the remarkable facts in current history." Other subjects treated in the report are Canadian competition, interstate traffic not subject to the Act, statistical work of the commission for the years ending June 30, 1891 and 1892, Government aided railroads and telegraph lines, fourth Convention of Railroad Commissioners, and relations of railway companies and their employes.

The power of the commission to relieve from hardship under the Act is strictly limited.<sup>1</sup> It has no power to require the adoption of an equal and uniform mileage basis.<sup>2</sup> The Act includes only such carriers as use a railway or a railway and water craft "under common control, management or arrangement for a continuous carriage or shipment" from one state to another.<sup>3</sup> So far as a railroad whose line is entirely within one state issues through

<sup>1</sup> *Re Iowa Barb Steel Wire Co.* 1 Inters. Com. Rep. 605.

<sup>2</sup> *LaCrosse Manufactures & J. Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 9.

<sup>3</sup> *Ex parte Koehler*, 1 Inters. Com. Rep. 28, 30 Fed. Rep. 867; *Missouri & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co.* 1 Inters. Com. Rep. 607.

bills of lading to points in other states and makes through rates, it falls under the provisions of the Act.<sup>1</sup> The regulation of the transportation of foreign merchandise from a port of entry to a place within the United States, upon a through bill of lading, does not extend to the control of rates made in the foreign port for its carriage to the port of entry of the United States or to a foreign country adjacent.<sup>2</sup> This interstate commerce consists of intercourse and traffic between citizens of different states, and includes the transportation of property and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.<sup>3</sup> Transportation of property from one state to another is interstate commerce, whether carriers engaged in moving it or vehicles on which it is borne, cross line of state or not.<sup>4</sup> A transportation of goods under one contract and by one voyage from the interior of Illinois to New York is interstate commerce.<sup>5</sup> Shipments between points within the same state do not constitute interstate commerce because made on a railroad which runs for part of the trip in another state. The enforcing of an order of railroad commissioners requiring a railroad company to conform to their schedule of rates is a matter of public right for which an action may be maintained in behalf of the state.<sup>6</sup>

In *Lord v. Goodall, N. & P. S. Co.* 102 U. S. 541, 26 L. ed. 224, it was decided that vessels navigating the high seas, although engaged only in the transportation of goods and passengers between ports and places in the same state were subject to the acts of Congress regulating the liability of the owners of vessels navigating the high seas by virtue of the power of Congress over commerce. But in the recent case of *Lehigh Valley*

<sup>1</sup> *Re Annapolis, W. & B. R. Co.* 1 Inters. Com. Rep. 315.

<sup>2</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

<sup>3</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 830.

<sup>4</sup> *Ex parte Kähler*, 1 Inters. Com. Rep. 28, 30 Fed. Rep. 867.

<sup>5</sup> *Wabash St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31.

<sup>6</sup> *Campbell v. Chicago, M. & St. P. R. Co.* 17 L. R. A. 443, 4 Inters. Com. Rep. 203, 86 Iowa, 587.

*R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, affirming the decision of the supreme court of Pennsylvania, reported in 2 Inters. Com. Rep. 226, also in a note to 1 L. R. A. 232, it was also decided by the Supreme Court of the United States that the mere passage of freight and passengers over the soil of another state in transit between points in the same state, does not render the transportation interstate commerce so as to exclude the power of the state in which the shipments were made to tax the traffic. And the court says that it was unnecessary in *Lord v. Goodall, N. & P. SS. Co. supra*, to invoke the power to regulate commerce in order to find authority for the law in question, as it might be referred to the power as to maritime law. Another consideration as stated in both cases is that the laws of nations on the high seas might become involved and the United States compelled to respond. In *Pacific Coast SS. Co. v. Railroad Comrs.* 9 Sawy. 253, the circuit court of the United States held that California state railroad commissioners had no power to regulate or interfere with transportation by a steamship company between ports within the state if they were in transit to or from other states or if the transportation consisted of voyages upon the ocean bringing the steamships under the exclusive control of Congress. The above decision of the United States Supreme Court seems to settle the law in accordance with the decision in *Campbell v. Chicago, M. & St. P. R. Co.* 17 L. R. A. 443, 4 Inters. Com. Rep. 203, 86 Iowa, 587, thus overruling *State v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 519, 3 L. R. A. 238, 40 Minn. 267, in which the railroad and warehouse commission of the state was held to have no authority to fix the rates for transportation between two points within the state over a route extending across a neighboring state. And it would seem also to overrule *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289, and *Sternberger v. Cape Fear & Y. V. R. Co.* 2 Inters. Com. Rep. 426, 2 L. R. A. 105, 29 S. C. 510, in which the decision was similar to that of the Minnesota case, unless a distinction is to be made in the South Carolina case by reason of the fact that the transportation between points in the same state was over several

railroads, some of which were entirely in that state and some entirely in North Carolina, and others partly in both states. Somewhat remotely connected with this question is the decision in *Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 194, to the effect that a shipment from another point in the same state to Kansas City, Mo., does not become interstate commerce because the delivery was actually made across the state line in Kansas where the consignee's place of business was, as the contract was for a shipment to Kansas City, Mo., and any other place of delivery was merely for the convenience of the parties.

A shipment is not within the provisions of a statute forbidding carriers within the state to limit their common law liability, where the contract provides for the carrying of the goods to a foreign port by means of the carrier's own line, its connecting lines in another state, and an ocean steamship company. A statute forbidding common carriers within the state, on land or in boats or vessels on the waters entirely within the body of the state, to limit or restrict their liability as it exists at common law, applies to shipments purely domestic beginning and ending in the state. A clause limiting the liability of a railway company to its own line which is wholly within the state will not convert into a domestic bill of lading an instrument which purports on its face to be a through bill of lading to a foreign port, providing for the transportation of the goods to their foreign destination and fixing the through rate of freight.<sup>1</sup>

The general doctrine that an agency in transportation which is entirely within the limits of a state may be regarded as engaged in interstate or foreign commerce has been long established. Thus a steamer running entirely within the limits of a state is an instrument of interstate commerce when engaged in receiving and transporting goods in the course of transportation from one state to another.<sup>2</sup> So any railroad which forms a part of or constitutes a link in a through line extending into several states is engaged in interstate commerce so far as it transports goods

<sup>1</sup> *Missouri Pac. R. Co. v. Sherwood*, 17 L. R. A. 643, 4 Inters. Com. Rep. 240, 84 Tex. 125.

<sup>2</sup> *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

bound from one state to another.<sup>1</sup> And vessels engaged in towing or lightering in aid of vessels which are engaged in foreign or interstate trade and commerce are themselves to be regarded as engaged in such commerce.<sup>2</sup> While the above cases do not directly decide any question of shipments, but questions as to license, taxation, or other control and regulation of the agencies of commerce, they involve questions as to the nature of transportation within a state when it is only a part of transportation beyond the limits of the state. So the regulation of charges for transportation within a state by a railroad which is only a part of a through transportation between states is beyond the power of the state.<sup>3</sup> But when two carriers act independently though concurrently in making reduced rates, and no through bill of lading or freight receipt is given, and neither is interested in or liable for the carriage of goods beyond its own line, the transportation by one carrier entirely within the limits of a state is not interstate commerce, although the transportation by the other carrier extends into another state, and the Interstate Commerce Act does not apply to the former carrier unless the goods are shipped directly to or from a foreign country.<sup>4</sup> When the products of the farm or the forest are collected and drawn, floated, or otherwise brought into a town or station, whether on a river or a line of railroad, they are not exports or in process of exportation until committed to a common carrier for transportation out of the state, or started on such ultimate passage.<sup>5</sup> Where transportation of goods destined for a point without the state has been actually begun, temporary stoppage within the state, without the intention of abandoning the original movement, which is ultimately completed, will not deprive the transportation of the character of in-

<sup>1</sup> *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178.

<sup>2</sup> *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Sinnott v. Davenport*, 63 U. S. 22 How. 227, 16 L. ed. 243; *Foster v. Davenport*, 63 U. S. 22 How. 244, 16 L. ed. 248; *Harmon v. Chicago* (Ill.) 34 Am. & Eng. Corp. Cas. 149.

<sup>3</sup> *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31; *Louisville & N. R. Co. v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679.

<sup>4</sup> *Ex parte Koehler*, 1 Inters. Com. Rep. 28, 30 Fed. Rep. 867.

<sup>5</sup> *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715.



terstate commerce.<sup>1</sup> Neither can the character of transportation to another state be destroyed by shipping to an agent within the state by a local bill of lading and reshipment by him without unloading, breaking bulk, or delay, to the ultimate consignees in another state, and the shipment to the agent is not subject to the regulation as to rates by the state railroad commission.<sup>2</sup>

The Act does not apply to a railroad wholly within a state, joining with connecting steamers in independent although concurrent reduction of rates, unless goods are going to or from a foreign country. The Interstate Commerce Act does not apply to carriage wholly within a state of property shipped from or destined to a point without, not in a foreign country.<sup>3</sup> Knowledge of the carrier, whose line is wholly within state, that the ultimate destination of freight is without the state will not make it subject to the Interstate Commerce Act. That the ultimate destination of freight delivered to a carrier, for transportation from one point to another in the same state, is in another state, does not bring the transportation by such carrier within the jurisdiction of the Commission.<sup>4</sup> The word "line" in the Act to Regulate Commerce means a physical line, not a business arrangement.<sup>5</sup> A short road used as means of conducting interstate traffic in coal by companies owning connecting interstate roads, is subject to Act to Regulate Commerce. Such road must be accessible to interstate shippers on equal and reasonable terms, and cannot be used to discriminate between mine owners on its line.<sup>6</sup> The Act to Regulate Commerce should be liberally construed in favor of commerce among the states; but when complaint is made or relief sought solely or mainly in the interest of common carriers, the act complained of or the right asserted, must clearly appear to

<sup>1</sup> *Delaware & H. Canal Co. v. Com.* (Pa.) 1 L. R. A. 232, 2 Inters. Com. Rep. 222.

<sup>2</sup> *Cutting v. Florida R. & Nav. Co.* 46 Fed. Rep. 641.

<sup>3</sup> *Ex parte Koehler*, 1 Inters. Com. Rep. 28, 30 Fed. Rep. 867.

<sup>4</sup> *Missouri & I. R. Tie Lumber Co. v. Cape Girardeau & S. W. R. Co.* 1 Inters. Com. Rep. 607.

<sup>5</sup> *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571. But, see late opinion of Justice Brewer in Court of Appeals, *ante*.

<sup>6</sup> *Heck v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 775.

have been forbidden or conferred; and where the complaining carrier is not in a position to commend itself to the favorable consideration of a court of equity, no strained construction of the law will be made in its favor. The right asserted by a petitioner asking for the enforcement of an order of the Interstate Commerce Commission arises and is claimed under a law of the United States which relates to a subject over which Congress has exclusive control; and this is sufficient to sustain the jurisdiction of the circuit court, independent of the citizenship of the parties to the controversy, since it involves a Federal question.<sup>1</sup>

A complaint, under the Act to Regulate Commerce, based on acts which were done before the passage of the statute, charges no violation of the Act, within the cognizance of the Interstate Commerce Commission.<sup>2</sup> The person aggrieved should complain in his own name; complaint by a ticket broker will not be entertained.<sup>3</sup> The complainant need not necessarily have a pecuniary interest to be entitled to a hearing.<sup>4</sup> The burden of proving the exaction of unreasonable rates is on petitioner.<sup>5</sup> A complaint, of which no reasonable ground for investigation appears, will not be filed.<sup>6</sup> The Act contemplates that a carrier complained of for charging exorbitant rates, may change rates before a hearing. In such case the petition may be dismissed.<sup>7</sup> The burden is on the carrier to justify any departure from the rules prescribed by the statutes.<sup>8</sup> Damages cannot be awarded by the Commission where defendants were entitled to have the amount assessed by a jury.<sup>9</sup> But a procedure for the enforcement of lawful orders of the Commission, founded upon controversies

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

<sup>2</sup> *White v. Michigan Cent. R. Co.* 2 Inters. Com. Rep. 641.

<sup>3</sup> *Ottlinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607.

<sup>4</sup> *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571.

<sup>5</sup> *Harding v. Chicago, St. P. M. & O. R. Co.* 1 Inters. Com. Rep. 375.

<sup>6</sup> *La Crosse Manufacturers & J. Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 10.

<sup>7</sup> *Fulton v. Chicago, St. P. M. & O. R. Co.* 1 Inters. Com. Rep. 375.

<sup>8</sup> *Re Southern R. & Ss. Asso.* 1 Inters. Com. Rep. 278.

<sup>9</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787; *Heck v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 775.

which required trial by jury, having been provided by the amendment of March 2, 1889, of section 16 of the Act to Regulate Commerce, it is the duty of the Commission to pass upon the question of reparation for past damages whenever a claim is made therefor.<sup>1</sup> The Act does not afford a remedy for transactions occurring before it took effect.<sup>2</sup> The Commission will not express its opinion in a case not within its jurisdiction.<sup>3</sup> Where the parties neither by evidence nor argument supply the Commission with information as to the question propounded, it will not be decided.<sup>4</sup> The Interstate Commerce Commission has authority to institute investigations and to deal with violations of the law independently of a formal complaint, or of direct damage to a complainant.<sup>5</sup> Investigation may be made by the Commission on its own motion, concerning a course pursued by certain carriers in respect to compliance with the provisions of the Act to Regulate Commerce.<sup>6</sup> A complaint made for the purpose of retaliation for a fancied wrong—as, to get even with a carrier for the revocation of complainant's pass—does not commend itself to the Commission.<sup>7</sup> It will not determine a collateral inquiry or question presented by evidence admissible only for other purposes, until an opportunity has been furnished the parties to be heard in a proceeding such as is provided for by the statute.<sup>8</sup> It has no power to make rates generally, but only to determine whether rates imposed by railroads are in conflict with statute.<sup>9</sup> It has no power to enforce contracts, nor has it any general power to manage business of carriers.<sup>10</sup> The Commission

<sup>1</sup> *Macloon v. Chicago & N.W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>2</sup> *Ottinger v. Southern Pac. R. Co.* 1 Inters. Com. Rep. 607; *Traders & T. Union v. Philadelphia & R. R. Co.* 1 Inters. Com. Rep. 371; *Holbrook v. St. Paul, M. & M. R. Co.* 1 Inters. Com. Rep. 323.

<sup>3</sup> *Re Iowa Barb Steel Wire Co.* 1 Inters. Com. Rep. 605.

<sup>4</sup> *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722.

<sup>5</sup> *Re Grand Trunk R. Co.* 2 Inters. Com. Rep. 496.

<sup>6</sup> *Re Atlanta & W. P. R. Co.* 2 Inters. Com. Rep. 461.

<sup>7</sup> *Slater v. Northern Pac. R. Co.* 2 Inters. Com. Rep. 243.

<sup>8</sup> *Business Mens Asso. v. Chicago & N.W. R. Co.* 2 Inters. Com. Rep. 48.

<sup>9</sup> *Thatcher v. Fitchburg R. Co.* 1 Inters. Com. Rep. 356; *Re Theatrical Rates*, 1 Inters. Com. Rep. 18.

<sup>10</sup> *Traders & T. Union v. Philadelphia & R. R. Co.* 1 Inters. Com. Rep. 371.

has only a limited power, expressly defined by the Act, to interfere to prevent wrong and oppression in specified cases.<sup>1</sup> The statute provides that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant," and defendants are therefore not entitled to a dismissal of the complaint on the ground that the petitioners, being merely commission merchants, can sustain no direct or material damage under the rates in question.<sup>2</sup> When on complaint of a earload shipper unjust discrimination is alleged to result from equal rates on earload and less than earload quantities of the same commodity, the burden of proof is upon the complainant.<sup>3</sup>

When a carrier on complaint under the fourth section avers such substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading, and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance, are in fact substantially dissimilar; but upon an application for relief under the fourth section proviso, the carrier is not limited by such a rule of evidence, and may present to the Commission every material reason for an order in its favor. There seems to be no limitation upon the power of the Commission to grant relief under that proviso when, after investigation, the Commission is satisfied that the interests of commerce, and common fairness to the carriers, require that an exception should be made.<sup>4</sup> When investigation by the Commission to inquire into the business management of a common carrier has been fully concluded as to some matters, and not concluded as to others, an order may be made *pendente lite*, as to the former, and the cause retained for further consideration and order as to the latter.<sup>5</sup> The fact, that the property and affairs of a carrier have been placed by a United States court in the hands of a receiver, does not affect the jurisdiction of

<sup>1</sup> *Traders & T. Union v. Philadelphia & R. R. Co.* 1 Inters. Com. Rep. 371; *Re Iowa Barb Steel Wire Co.* 1 Inters. Com. Rep. 605.

<sup>2</sup> *James v. Canadian Pac. R. Co.* 4 Inters. Com. Rep. 274.

<sup>3</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

<sup>4</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 121.

<sup>5</sup> *Re Carriage of Persons Free or at Reduced Rates*, 3 Inters. Com. Rep. 717.

the Commission under a complaint charging such carrier with violation of the Act to Regulate Commerce.<sup>1</sup> Nor should the fact of a receivership for a defendant carrier subsequent to complaint, interfere with the progress of a proceeding brought merely for the purpose of railway regulation.<sup>2</sup> A service upon the main line of a railway, outside of yard limits and under orders, as in case of regular or special trains, is not a switching service; and an order of the railway commissioners that all shipments tendered shall be switched over such line will not be enforced by a decree, where its enforcement involves a change in the management as to classification and operation of trains, and would necessitate an extension of the company's line for switching service, and the subjection thereto of a part of the main line track outside the yard limits under direction of a yardmaster.<sup>3</sup> The provision of the Interstate Commerce Act, that the findings of fact of the Commission shall be prima facie evidence of the matters therein stated, does not make them conclusive in proceedings before the court to enforce the order of the Commission; but the court must consider all evidence submitted, and base its judgment thereon.<sup>4</sup>

The principal office, within the meaning of the Act of Congress authorizing a circuit court where such office is situated to enforce orders of the Interstate Commerce Commission, of a railroad corporation created by an Act of Congress which does not prescribe where such office shall be kept, is the one where its principal officers have their business domicile, the meetings of stockholders, directors and executive committee are held, the stock books kept and the dividends declared, rather than the place where the subordinate officers in charge of the operating, traffic and accounting departments of the business discharge their duties.<sup>5</sup> The process of a Federal court was refused by Judge Gresham in the U. S. Circuit Court in aid of an investigation before the Inter-

<sup>1</sup> *Board of Trade of Troy v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 348.

<sup>2</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 121.

<sup>3</sup> *State v. Chicago, M. & St. P. R. Co.* (Iowa) May 23, 1893.

<sup>4</sup> *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 323, 50 Fed. Rep. 295.

<sup>5</sup> *Interstate Commerce Com. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 62.

state Commerce Commission, declaring it an administrative and not a judicial body; and that a proceeding before an administrative body is not a "case" or "controversy" within the constitutional powers of the Federal courts. The conclusion reached was that so much of section 12 as authorizes the courts to use their process in aid of inquiries before the Interstate Commerce Commission is unconstitutional and void, and the application was dismissed.<sup>1</sup> The United States Supreme Court on appeal denied this doctrine *in toto*, reversing the decision of the circuit court.<sup>2</sup>

### § 109. *State Railroad Commission.*

Investing a railroad commission with authority to make just and reasonable rules and regulations to prevent excessive charges and unjust discriminations and preferences by carriers, the reasonableness and legality of which is reviewable by the courts, is not unconstitutional as a delegation of legislative power. Authority is given to the railroad commission to hear and determine complaints of unjust discriminations and preferences under a Railroad Commission Act, which expressly provides that if a railroad company is guilty of a violation of the rules of the commission and after due notice of such violation does not make full recompense for the wrong or injury done, it shall incur a penalty, and also constitutes such commission a court of record. The details of practice and pleading may be supplied by a railroad commission which is constituted a court of record under the inherent power of every court of record to make such rules not inconsistent with the law as are necessary to the exercise of the powers conferred upon it.<sup>3</sup> The provision for a railroad commission, in a state constitution, the control of which extends to "transporta-

<sup>1</sup> *Re Interstate Commerce Commission*, 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476.

<sup>2</sup> See *Interstate Commerce Commission v. Brimson*, 4 Inters. Com. Rep. 545, 154 U. S. 447, 38 L. ed. 1047.

<sup>3</sup> *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 4 Inters. Com. Rep. 294, 18 L. R. A. 393, 111 N. C. 463.

tion companies," should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint stock companies, partnerships or individuals.<sup>1</sup> A state railroad commission will not be enjoined from carrying into effect a maximum schedule of freight rates made by it, on the ground that they were so low as to prevent the railroad from doing a compensatory business, where the evidence as to the probability of loss is substantially conflicting, and only a very small part of the local traffic will be affected by the rate, until experience has shown that such rate is not compensatory. Where the state railroad commission was temporarily enjoined from enforcing a maximum schedule of freight rates, on the ground that they were so low as to prevent a compensatory business by the railroads, it was not a violation of the injunction for them to make another schedule of rates, after investigation of another complaint, even though the purpose of the complaint was to evade the injunction, as the commissioners did no more than their duty in hearing the complaint and establishing proper rates upon the decision thereof.<sup>2</sup> An inquiry by the courts into the reasonableness of rates established by state authority for railroad transportation is not prevented by the fact that the legislature has pursued the forms of law in prescribing a schedule of rates; but the question is open and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or are mere proceedings which, if not restrained, will work a confiscation of property.<sup>3</sup> The Mississippi statute of March 2, 1888, as settled by the supreme court of that state, applies solely to commerce within the state; and the Supreme Court of the United States must accept as conclusive such construction of the statute of the state by its highest court.<sup>4</sup>

<sup>1</sup> *Moran v. Ross*, 79 Cal. 549.

<sup>2</sup> *Chicago, B. & Q. R. Co. v. Dey* (C. C. S. D. Iowa) 38 Fed. Rep. 656.

<sup>3</sup> *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 866.

<sup>4</sup> *Louisville, N. O. & T. R. Co. v. Mississippi*, 2 Inters. Com. Rep. 801, 133 U. S. 587, 33 L. ed. 784.

Where a tariff of freight and passenger rates has been established by the state railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs, as fixed by the commissioners, must, in so far as the courts are concerned, be left to the test of experiment.<sup>1</sup> So long as public officers confine themselves to such duties as are confided to them by law, the court will not interfere to see whether they are acting wisely or judiciously.<sup>2</sup> A statute prohibiting more than fair and reasonable rates by a railroad corporation, being merely declaratory of a common law rule, although penal, does not deprive the company of its property without due process of law, because the statute does not fix any limit of the rates,—especially where a provision is made in the same statute for the fixing of rates by commissioners. There is no unconstitutional delegation of power to railroad commissioners by a statute authorizing them to fix reasonable maximum rates of charges for freight and passenger traffic, where their schedule is not final but is made merely *prima facie* evidence of the reasonableness of the rates established. Making a schedule compiled by commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for railroad carriage does not infringe upon the right of trial by jury. Provisions in a statute as to unlawful discrimination in rates will, even if unconstitutional, not make invalid other provisions as to reasonableness of rates. Where only transportation within the state, and that which is not a part of any continuous transportation without the state, is within the provisions of an act, it does not affect interstate commerce. The power of railroad commissioners to make a schedule of reasonable maximum rates does not impair the obligation of the contract of a railroad company,

<sup>1</sup> *Pensacola & A. R. Co. v. State*, 2 Inters. Com. Rep. 522, 3 L. R. A. 661, 25 Fla. 310.

<sup>2</sup> *Western U. Teleg. Co. v. New York*, 2 Inters. Com. Rep. 533, 38 Fed. Rep. 552.



under an act which authorized its board of directors to establish rates of toll from time to time, but also provides that the company's by-laws shall not be repugnant to the constitution and laws of the state.<sup>1</sup>

A statute authorizing railroad commissioners to fix reasonable and just freight rates, and providing that such rates shall be sufficient evidence, in an action to enforce them, of their reasonableness, is not unconstitutional as making them conclusive evidence and depriving the railroad companies of a full hearing upon the reasonableness of the rates fixed. The courts will not interfere or grant any relief to a railroad company against rates fixed by commissioners, upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety, for the courts have no power to make freight or passenger tariffs.<sup>2</sup> But reduction of rates of transportation upon a railroad so as to injure the vested rights of the carrier in his property by statute or by the act of a railroad commission, is unconstitutional as a deprivation of property without due process of law.<sup>3</sup>

The provisions of the Hoult Law (Oregon) passed Feb. 20, 1885, leaving to railroad companies the right, under certain limitations, to fix freights, and declaring the charging of more for a shorter than for a longer haul in the same direction an unjust discrimination, are repealed by the Oregon Act of Feb. 20, 1891,<sup>4</sup> leaving to a commission the power to fix rates, subject to a decree of the courts as to their reasonableness.<sup>5</sup> A construction by the railroad commissioners, of the term "car load," in a statute fixing the maximum freight rates at so much per car load for each of the several classes of freight, as meaning, in the light of existing usage, ten tons, and not all

<sup>1</sup> *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196.

<sup>2</sup> *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 24 L. R. A. 141.

<sup>3</sup> *Clyde v. Richmond & D. R. Co.* 57 Fed. Rep. 436.

<sup>4</sup> 2 Hill's Code (2d ed.) p. 1967.

<sup>5</sup> *State v. Rogers*, 22 Or. 348.

that a car can safely carry, is reasonable and just and will be followed by the courts where it has been acted upon long enough to become a rule. The enforcement of a tariff of freight and passenger rates which will not pay the expenses of operating a railroad was held, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and to amount to a taking of the railroad company's property without just compensation.<sup>1</sup> A Federal court has jurisdiction of a suit by a railroad company chartered in one state to restrain the railroad commissioners of another state from putting in force a schedule of rates, since such a suit is not one against a state, within the 11th Amendment of the United States Constitution.<sup>2</sup> But the order of the state board of transportation determining what is a proper charge to and from any points within the state, based on its finding of facts, will be prima facie evidence of its correctness.<sup>3</sup> The Iowa Act of April 5, 1888, gives to the state board of railroad commissioners power to make a full schedule of maximum rates of transportation charges of railroad companies, after the investigation of any complaint; which schedule shall apply to all points within the state, and shall not be limited to the matter set out in the complaint.<sup>4</sup> The word "locality," in the Act prohibiting discrimination against any person, firm, corporation or locality, in railway charges, may refer to a village, city, county or portion of the state.<sup>5</sup> An order of railroad commissioners providing that the maximum rate of freight to be charged by any railroad company receiving freight from a shipper at a station on its line destined to a point on the line of another road, or receiving freight from another road destined to a point on its own line, shall be a certain per cent of the

<sup>1</sup> *Ross v. Kansas City, St. J. & C. B. R. Co.* 111 Mo. 18.

<sup>2</sup> *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 866; *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196.

<sup>3</sup> *State v. Fremont, E. & M. V. R. Co.* 22 Neb. 313.

<sup>4</sup> *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. Rep. 656.

<sup>5</sup> *State v. Fremont, E. & M. V. R. Co.* 22 Neb. 313.

single rates, fixes a joint rate, requiring the statutory notice for establishing an original rate, and is not a mere revision of the schedule of rates with reference to single rates, which may be made without notice under the Iowa statutes. The fixing of a joint freight rate, by the Iowa railroad commissioners, for shipments over two or more lines in the state, is governed by the latter section of Iowa Act 1890, and is unauthorized by Act 1888 and the first section of Act 1890; and notice of intention to fix such freight rate as provided by Act 1890, chap. 17, § 17, is essential to the jurisdiction of the board.<sup>1</sup> Where a schedule of rates for railroad charges, fixed by legislative authority, will not pay the cost of necessary service, appliances and the repair thereof, interest on bonds, and then leave something for dividends, its enforcement will be enjoined. In a suit to restrain the enforcement of unreasonable rates, it is no defense that plaintiff is a foreign corporation and may retire when the business ceases to be profitable, or that it operates through other states, where no rates are fixed which will enable it to make profit. In a suit to restrain the enforcement of unreasonable rates it is no defense that the reduced rates may increase the volume of business and make it the more remunerative in the future.<sup>2</sup> Where the actual cost for switching cars in a city exceeds the compensation fixed therefor by a schedule of rates prepared by state railroad commissioners, the schedule cannot be enforced.<sup>3</sup>

Indeed, it has been said that courts cannot carry into effect the decisions of the railroad commissioners. Neither the attorney general nor the courts can enforce their order,<sup>4</sup> and it is beyond the powers and functions of the courts to hold practically under their control the administration of railroad affairs as to freight and other business.<sup>5</sup> An order or recommendation of the railroad commissioners requiring a railroad company to repair its road or

<sup>1</sup> *Chicago & N. W. R. Co. v. Dey*, 2 Inters. Com. Rep. 325, 1 L. R. A. 744, 35 Fed. Rep. 866.

<sup>2</sup> *State v. Chicago, B. & Q. R. Co.* (Iowa) May 14, 1894.

<sup>3</sup> *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. Rep. 883.

<sup>4</sup> *People v. New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484; *People v. Rome, W. & O. R. Co.* 103 N. Y. 95.

<sup>5</sup> *Chouteau v. Union R. & Transit Co.* 22 Mo. App. 286.

track for the security, accommodation, and convenience of the public, is, under Kan. Gen. Stat. 1889, ¶ 1328, advisory only, and is not conclusive either upon the railroad company or on the courts.<sup>1</sup> The penalties prescribed by Mass. Pub. Stat. chap. 112, §§ 192-194, cannot be recovered against a railway company for refusing to carry milk for the rates fixed by the railroad commissioners, where the proceedings before the board were not regular and formal, and its order was not explicit, and the record does not show that the company was ever notified of the proceedings or had an opportunity to be heard before the commissioners.<sup>2</sup> The Railroad Commission Act of Florida conferring authority upon railroad commissioners to fix reasonable freight and transportation railway rates is not unconstitutional as authorizing an exercise of judicial or legislative power, which cannot be delegated.<sup>3</sup> A railroad company which has not exacted a charge in excess of the maximum rate fixed by Mo. Act 1887, regulating charges by carriers, and providing that the railroad commissioners may, upon failure of the carrier fix a schedule of reasonable rates, is not, in the absence of rates fixed by the commissioners, liable in treble damages for extortion, under the provisions of such Act giving a right of action to a shipper for unlawful charges.<sup>4</sup> The charter of a railroad company is not a contract, the obligation of which is impaired by a statute, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination and enforce certain police regulations affecting railroad companies doing business in that state.<sup>5</sup>

### § 110. *Uniform Classification.*

When the Act of Congress to Regulate Commerce went into effect the several articles of commerce which were the subjects of transportation by rail were, to a considerable extent, in dif-

<sup>1</sup> *State v. Kansas Cent. R. Co.* 47 Kan. 497, 49 Am. & Eng. R. Cas. 176.

<sup>2</sup> *Littlefield v. Fitchburg R. Co.* 158 Mass. 1.

<sup>3</sup> *Storrs v. Pensacola & A. R. Co.* 29 Fla. 617.

<sup>4</sup> *Winsor Coal Co. v. Chicago & A. R. Co.* 52 Fed. Rep. 716.

<sup>5</sup> *Stone v. Farmers Loan & T. Co.* ("Railroad Commission Cases") 116 U. S. 307, 29 L. ed. 636.

ferent sections of the United States, for the purposes of rating, classified differently. In one section the several carriers were perhaps found to be associated together in the use of a classification containing a number of classes, commonly in the neighborhood of six, in which the articles expected to be offered for transportation were arranged, those which it was thought should bear the highest rates being placed in the first class, and so on in descending order to the last. Such an arrangement facilitated the making of rate sheets, since it enabled a great number of articles to be rated together in a single paragraph by specifying the rate for the class instead of for each article separately, as would otherwise have been necessary. The carriers associated in another section would perhaps have made and put in force a classification considerably different from this; and overlapping the territory of one or both there was, in many cases, found in force still another classification, made sometimes by the carriers, sometimes by state authorities for the roads of the state. Even single roads in some cases had independent classifications. The consequent confusion may easily be conceived. The purchaser of property at a distance often found great difficulty in learning what the charges for carriage would be, and this difficulty sometimes approached an impossibility when the shipment was for long distances, since the classification might change several times on the way. The consequent difficulty in making the ordinary calculations for business sales or purchases which must always be affected by the charges for carriage, is obvious. Traffic managers and agents found themselves, almost as much as the shippers, embarrassed by the difficulty of keeping so far posted as to be able to state with accuracy the successive sums which would make up the total to be paid by the shipper of freight for any considerable distance. The consequent errors and claims against the carriers for refunding overcharges were infinite in number and furnished a great amount of labor for the management of roads, besides resulting in many losses.

One peculiarity of this variety of classification was that, although all were made with some regard to uniform general principles, they all varied in the application of these principles, and

upon considerations more or less special to their respective districts. Thus none of them perhaps lost sight of the general principle, that the rating of articles of commerce may properly be made to bear some proportion to the value, the most valuable being taxed highest to the relief of those which cannot bear transportation for a long distance, or perhaps at all, if the charge were to be measured strictly by the carriers' service. Nevertheless each classification qualified this principle in its application with a view to the special benefit of the products and industries of its section; and the same article might therefore be rated low in a section where the prosperity of the people largely depended upon it and high in another section where its production was limited or unknown, and where other articles of local production were rated low for like local reasons. The classifications thus had, as between different sections, an effect something similar to that which might be produced if the several states had power to lay customs duties and should do so on the principle of protecting local industries. This state of things was one of the first to which the Commission directed its attention, and it has uniformly insisted that the several existing classifications ought to be merged into one. The Commission, however, has never overlooked or failed to appreciate the very great difficulties that must attend such a work. It was perfectly obvious that the merging could not be effected by the voluntary action of the railroad authorities which had made the classifications without very great concessions being made on every side; concessions, the necessary effect of which must be, while lowering the relative rates upon some articles of commerce, to very considerably increase them upon others. Not only would the roads be affected thereby, but every section of the country would of necessity be compelled to resign something of the advantage which before it had enjoyed in respect to its special products or industries; and it could not be expected to assent to this willingly until it should be made to see that adequate compensation was made in other directions. It would not be enough that the completion of such a work could plainly be seen to be of national importance, and politic and useful for the people as a whole, but it must also be evident to any particular

section that it lost nothing by its accomplishment. Even when this was obvious the local interests unfavorably affected by the unification must be expected to oppose it vigorously.

In September, 1888, a resolution passed the lower house of Congress directing the Commission, prior to January 1, 1889, to prescribe one uniform classification of freight for the use and guidance of the various railroads of the United States. This resolution was laid aside in the Senate, doubtless because it was believed that the preparation of a satisfactory classification within the time mentioned was quite beyond the power of any body of men; and, second, because to make a classification by concessions on behalf of every section of the country, it was indispensable that every section should be represented and that the representatives should be familiar with the reasons which had influenced the making of the classification then in force. Obviously such representatives were most likely to be found among traffic managers of roads or officers of railway associations, whose interests, as well as the interests of sections served, were directly involved. The Commission, however, took frequent occasion to impress earnestly upon railway managers the necessity for their taking early action, not only because it was important in the interests of the public and of the roads themselves, but also because it must inevitably be brought about at some not distant day, by statute if not otherwise; and every day's delay only prolonged and increased the disorder and confusion. Many railroad managers responded promptly and favorably so far as their individual influence could go, but among many of the ablest and fairest-minded of the managers it has all the while been an accepted maxim that to combine freight classifications into one, otherwise than very slowly and by successive steps, was quite out of the question, and that all suggestions pointing to speedy consolidation could only be looked upon as Utopian. Nevertheless, there have been among those connected with railway service some men of ability and far-seeing views who have been of a different opinion, and who for the past three years especially have labored so far as other duties would permit of their doing so, to bring about uniform classification speedily. In December, 1888, delegates from the New England

Association, the Trunk Line Association, the Central Traffic Association, the Southern Railway & Steamship Association, the Mississippi Valley Lines, the Western Freight Association, the International Association and the Transcontinental Association convened at Chicago and appointed a standing committee consisting of two members from each association "to unify as rapidly as possible the several classifications now in use." Of this committee, Mr. J. W. Midgley, of Chicago, who, from the first, had been active and influential in working for uniform classification, was made chairman. The committee had numerous meetings, which continued up to June 21, 1890, when a report was agreed upon for submission to the associations represented. The report was accompanied by a classification also agreed upon, and which it was recommended should be made effective. The classification is voluminous, and with modifications has been adopted and put in force by the several associations now represented, January 1, 1895.<sup>1</sup> The changes which a general uniform classification will make in existing rates must be very considerable in all the associations, and they require careful study and examination before it can be fully determined that the effect will not be seriously harmful. This would be particularly the case in the territory of the Southern Railroad & Steamship Association, where the interests are more diverse than elsewhere, the railroads being in sharp competition, not merely with each other, but also with steamship lines at important points. There is every reason to believe, however, that the subject is being earnestly and favorably considered there as well as elsewhere, and with a determination that promises satisfactory results. A most unfortunate circumstance attendant upon this effort to accomplish a great reform is that the Transcontinental Association failed to unite in the result reached by the conference, so that the business of the Pacific Coast with the remainder of the country will necessarily for the present be left to the old confusion. Nevertheless a very long step has now been taken towards the final accomplishment of the great work of unification, and the time is not far off when one classification of

<sup>1</sup>Official classification No. 14, C. E. Gill, chairman, 143 Liberty Street, New York.



freights for the purpose of rating for transportation by rail will cover the whole territory which is subject to the Constitution and laws of the United States.

In considering the question of uniform classification the Interstate Commerce Commission decided the case of Coxe Brothers & Co. against the Lehigh Valley Railroad Company. The points decided are briefly as follows: First—Classification not obligatory on roads, but when misused, commission may correct. Second—Besides terminal expenses there are other considerations which justify lower proportionate charges for long distances. Third—Several connecting lines doing through business treated as one in the adjustment of rates. Fourth—Commission is authorized to determine what rates are reasonable, as well as what are unreasonable. Fifth—The present system of grouping mines in the Lehigh and Mahanoy anthracite coal regions for rates east and west subjects complainants to no undue prejudice. The rates which are now \$1.70, \$1.40 and \$1.20 per ton, according to sizes, are to be reduced to \$1.50, \$1.25 and \$1.05. The opinion refers to the complaint that bituminous and anthracite coals are carried at different rates over the same distance and the claim that both should be put in the same class of freight. It is conceded, says the commission, that the bituminous coal mines are twice, or more than twice as distant as the anthracite mines from New York harbor, or Perth Amboy, while transportation charges on bituminous are greater in the aggregate but less in proportion to the distance or per ton per mile. It is shown that in the last ten years the price of anthracite in eastern markets has been maintained and the price of bituminous considerably reduced. The complainants insist that the displacement of anthracite by bituminous, has deprived them and other miners of hard coal, of profitable markets, and that this condition is the result of excessive rates on anthracite, and of inequality and discrimination in favor of bituminous. The complainants ask relief through lower charges on anthracite, at the same time insisting that the charge on two coals shall be in proportion to the distance of carriage. The effect of such a rule is to require increased bituminous rates, or to make them higher than they would otherwise be over the longer distances, and thus

shut the cheaper coal out of New England and the Atlantic coast markets. Any regulation imposing additional transportation or other burdens on bituminous coal to keep it out of eastern markets, would sometimes challenge the wisdom which deposited an abundance of cheap fuel in the east side of the Alleghany mountains. The opinion states, the complainants also aver that the defendant railway company is giving undue preference to the Lehigh Valley Coal Company by charging complainants more for the transportation of anthracite coal, than is charged to said coal company. It is shown the railroad company owns the stock, property and franchises of the coal company, and the same persons are officers of both. The commission thinks that the facts justify the conclusion, that the railroad's charges to others than the coal company are to some extent excessive. Referring to the reduced rates fixed by the commission, the opinion says: The charges so adjusted on the several grades or sizes of coal are applicable to complainants' shipments to Perth Amboy, but are not meant to affect or establish the relation of the charges made, or to be made, on Buffalo and longer distance shipments, where lower anthracite rates are maintained than are or may be in force on tide shipments. The opinion says the rates now determined upon are believed to be liberal for freight so inexpensive as coal, and if after trial, it is found they are too high the commission will not hesitate to require further reduction.

Unreasonable or unjust classification of a commodity is not shown by evidence of lower classification for articles widely dissimilar in the elements of risk, weight, bulk, value, or general character. The proper method of comparison is the classification accorded by the carriers to analogous articles. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which is applied to less than carload quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers.<sup>1</sup> The justice of a claim for the lower rating on carload lots can only

<sup>1</sup> *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742, cited and reaffirmed.

be determined upon the facts in each case.<sup>1</sup> Salt requires and gets a commodity rate lower than class rates ; and railroads should only be limited as to such lower rating by the rule that a commodity shall not be carried at such unremunerative rates as will impose burdens upon other articles transported, to recoup loss incurred in carrying that commodity.<sup>2</sup> When classification is used as a device to effect unjust discrimination, or as a means of violating other provisions of the statute, the Interstate Commerce Commission must so revise and change it as to correct the abuse.<sup>3</sup> Two kinds of soap used for the same purposes, and so advertised and held out to the world, and substantially equal in value, should, for purposes of transportation and rating, be placed in the same classification.<sup>4</sup> Unless within the authorized exceptions to the general rule of the statute, discrimination in charges upon like shipments of the same commodities, based solely upon the purpose or "business motive" of the shipper, are unlawful, whether effected directly or indirectly by methods of classification.<sup>5</sup> The term "a like kind of traffic," as it occurs in the Act to Regulate Commerce, § 2, in respect to discrimination by carriers, does not mean traffic that is identical, but it means traffic that is of "a like kind" with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference.<sup>6</sup>

Whether a complaint to the Interstate Commerce Commission in regard to classification and rates is formal or informal, it is not enough that it be made against a classification committee or a rate committee concerning grievances alleged to be perpetrated by carriers in the matter of classification and rates, who are represented to some extent by such classification or rate committee in making rates, but which carriers are not bound to accept such

<sup>1</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

<sup>2</sup> *Anthony Salt Co. v. Missouri Pac. R. Co.* 4 Inters. Com. Rep. 33.

<sup>3</sup> *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

<sup>4</sup> *Beaver v. Pittsburg, C. & St. L. R. Co.* 3 Inters. Com. Rep. 564.

<sup>5</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>6</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

classification and rates, and do not accept them any further than they see proper to do so; in such a case the carriers who, it is alleged, are guilty of perpetrating the grievances should be made the parties defendant to the complaint, and the complaint should point them out by name. The Western Classification Committee in the making of classification and rates represents about seventy-five railroad companies, but the classification and rates made by this committee are merely recommendatory to the carriers in the Association, and it is not obligatory upon the carriers to accept and operate them; some of the carriers upon such articles, for example, salted hides and pelts in less than carloads, make commodity rates of their own upon the classification and rates different from those prepared and recommended by the Classification Committee, while other carriers do not; upon a complaint by a shipper against the Classification Committee alone, upon this statement of facts, it is evident that no investigation or order that the commission could make would have any binding effect whatever upon the carriers. Where all the interstate carriers of the country, working through a committee selected by them for that purpose, are endeavoring to reach a uniform classification of freight, instead of having the various different and conflicting classifications that exist, it being apparent to the commission that such uniform classification is a result that is greatly in the public interests, as well as in the interest of the carriers, and that has often been recommended by the commission to the carriers, the commission will not embarrass, delay or retard the carriers in this work by instituting investigations of its own under the 12th section of the Act to Regulate Commerce involving the classification of a few enumerated articles, transported from and to an extended area of country, but unless a formal complaint is made against the carriers in regard to such matter and a hearing of it pressed to a determination by the parties, the commission will wait a reasonable time to see the result of the effort being made by the carriers in their attempt to arrive at a uniform classification. When an informal complaint is made in regard to such a matter, against a classification committee alone, the commission will, if it can, endeavor to reach some ground that will fairly and justly adjust

the differences between the complaining shippers and the carriers, but if it appear that these conflicting differences exist not only between the carriers and the complaining shippers, but that there are other localities and other dealers whose interests are directly involved and who are opposed to the relief sought by the complaining shippers, then the practice of the commission is not to proceed in any investigation of the matter until the complaint is put into such shape that such localities and dealers, as well as the carriers complained of, can have an opportunity to be heard.<sup>1</sup>

### § 111. *Classification of Freight and Rates.*

Classification of freight for transportation purposes is lawful.<sup>2</sup> The proper classification of an article for freight rates is to be judged relatively by the classification of other articles similar in character, quality, and conditions of transportation.<sup>3</sup>

That a reasonable, fair and just difference may be made in proportion to quantity hauled of the same article in a full carload and in less than carload lots, and the respective rates charged upon each according to weight, is a principle that has been often recognized by the Interstate Commerce Commission. That a rate maker may and in fact should take into consideration such controlling conditions, in preparing a classification, as bulk and space occupied, the weight of the article as compared with its dimensions, its value, whether it can be so loaded into a car as to make a full carload, and whether as a matter of fact it is hauled in carloads as well as in less than carloads, are each and all true. A classification of freight designating different classes for carload quantities and for less than carload quantities, for transportation at a lower rate in carloads than in less than carloads, is not in contravention of the Act to Regulate Commerce.<sup>4</sup> The difference in the rate of transportation of compressed and uncompressed

<sup>1</sup> *McMillan v. Western Classification Committee*, 3 Inters. Com. Rep. 332.

<sup>2</sup> *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742.

<sup>3</sup> *Myers v. Pennsylvania Co.* 2 Inters. Com. Rep. 403; *Harvard v. Pennsylvania Co.* 3 Inters. Com. Rep. 257.

<sup>4</sup> *Thurber v. New York Cent. & H. R. R. Co. supra.*

cotton by rail carriers should be the actual and necessary cost of compressing.<sup>1</sup> Interstate carriers have power to make commodity class rates and special class rates to meet the circumstances and conditions of traffic along their lines.<sup>2</sup> Cost of service is only one of the elements to be considered in determining proper classification and relative rates for different articles.<sup>3</sup> In arranging the classification of articles of commerce, their market value and the shipper's representations to the public as to their character may properly be taken into account in ascertaining the analogy they bear to other articles in determining the class to which they justly belong. The volume of traffic supplied by an article for transportation is an element that may be considered on the question of its classification as a basis for rates.<sup>4</sup> For a special service by a carrier, such as the transportation of perishable freight, requiring quick movement, prompt delivery at destination, special fitting up of cars, their withdrawal from other service, and their return empty on fast time, a higher rate than for the carriage of ordinary freight, is reasonable and just, but should bear a just relation to the value of the service to the traffic, and is not wholly in the discretion of the carrier.<sup>5</sup> Competitive commodities are entitled to relatively reasonable rates for transportation, proportioned to each other according to the respective costs of service.<sup>6</sup> Terms of art, or terms peculiar to any occupation or business, used in a classification sheet to designate the product of a particular employment, are supposed to be understood in that employment; and it is not competent for railroad experts, when the meaning of the classification is questioned, to testify in what sense they are understood in classification circles.<sup>7</sup>

<sup>1</sup> *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777.

<sup>2</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

<sup>3</sup> *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.* 4 Inters. Com. Rep. 373.

<sup>4</sup> *Warner v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 74.

<sup>5</sup> *Delaware State Grange P. of H. v. New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554.

<sup>6</sup> *Squire v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 515.

<sup>7</sup> *Hurlburt v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 81.

Where questions of classification and rates are involved as to one particular article of freight, it is often necessary to examine and consider the classification and rates upon other articles in which the same calculations in respect of value, bulk and expense of handling, and of carriage, would to a considerable extent enter; and for the purposes of such comparison it is not indispensably necessary that the articles should be competitive with each other, though if they are competitive then this feature must more strongly bring to view the fact of discrimination in rates, if there be such.<sup>1</sup> The mere fact that one article, for example, sewing machines, is shipped "in greater quantities" than surgical chairs, when each as a rule is shipped in less than carload quantities, and of no large difference in bulk, weight and value, and of no appreciable difference in expense of handling and of haul, does not constitute in itself any reason why the former should enjoy lower rates or classification than the latter nor with the additional reason that they are shipped "in greater quantities." In such a case mere quantity, not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling and carriage, cannot be allowed to affect rates in the transportation of property. The small dealer is entitled to just and reasonable rates on his product, as much so as large dealers, and any discrimination between them in rates based upon the idea that the one class of persons makes many shipments while the other makes but few, is in the expressed judgment of the Interstate Commerce Commission unjust and unreasonable under the provisions of the Act to Regulate Commerce. It is a discrimination in favor of one kind of traffic as against another in the vital matter of rates, and is unlawful. The same doctrine found in what the commissioners call "occasional loose judicial dicta," to the effect that a carrier under such circumstances may make "concessions" in rates in favor of "a large as against a small quantity of freight," upon the idea that there is "a wholesale and retail principle" involved in it, is a doctrine that they regard as at war with the fundamental purpose of the Act to Regulate Commerce,

<sup>1</sup> *Harvard Co. v. Pennsylvania Co.* 3 Inters. Com. Rep. 257.

which has for one of its main objects the protection of the weak as against the strong, and destroys the establishment of proportional equity and justice. The commissioners conclude that these dicta, if given full effect, would undermine this fundamental purpose, and give to combinations and schemes for securing advantages over single individuals a power that would shut out all small competition, and put the weak at the mercy of the strong at every turn where railway transportation became a matter of moment in business transactions.

The Interstate Commerce Commissioners claim that the lower rate in proportion upon a carload of freight, treating a carload as a unit, than upon the same articles in less than a carload, does not come within any such principle as this, but is founded altogether upon different considerations. When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for carloads than that which is applied to less than carload quantities; but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers.<sup>1</sup> So also is the recognized principle that the longer the haul the lower the rate per ton per mile, although the aggregate rate is continually increasing, in consequence of which railway carriers can well afford to make through rates on very long hauls at charges less in proportion according to distance than local rates upon very short hauls. The proposition of lower rates according to "quantity" is very different from another with which it is sometimes confounded, namely, that a railroad company which has a very large volume of traffic, consisting of articles of different kinds, can well afford to make cheaper rates than one which has a small volume of traffic, for the reason that the cost of transportation is greatly reduced and the magnitude of its business and the revenue it receives thereon, will justify such cheaper rates. A difference is made by the official classification between articles boxed and those that are crated. All musical instruments must be boxed or they will not be taken, while it is sufficient if desks, sewing machines, surgical

<sup>1</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 235.



chairs and many other articles are crated. But it appears that pianos, cabinet organs, desks, sideboards and sewing machines, as a rule, are all shipped in less than carload quantities, the same as surgical chairs, and when necessary that various articles are transported in the same car with each of these, and that bundles or packages of goods that are not of great weight may be placed upon surgical chairs in the same manner as upon pianos, cabinet organs, desks and sewing machines.

A question was presented to the commission where the carload rate of surgical chairs is second class, or 52 cents per 100 pounds, from Canton to Boston, but it was said that for all practical purposes it might as well not exist, because manufacturers of these articles never ship them in that way, and in the course of their business cannot do so. The reasonableness of this rate is not questioned, but the very great difference between it and the less than carload rate may reasonably be insisted upon as a circumstance which shows that the latter is too high. This difference is great, it is a difference between 52 cents per 100 pounds and \$1.26 per 100 pounds, or a difference of 74 cents per 100 pounds, on a shipment of one of these chairs from Canton to Boston. The same difference would relatively exist to other points not so far distant. A difference like this under the circumstances the commission decides is manifestly too large; it is so great as to be unusual. A carrier cannot and does not expect to receive equally remunerative rates from each of the different kinds of freight carried by it over its line. It is entitled to a fair, reasonable and just rate upon each of these; and what is such fair, reasonable and just rate depends upon a variety of considerations. According to its condition, size and weight, a surgical chair cannot be said to be light and bulky when crated for shipment. There is of course a small amount of dead space connected with it, but this is frequently true of many kinds of freight. While these surgical chairs are not the heaviest freight, nor the most compact according to dimensions, yet they are far more so than many other kinds of freight. They are greatly more heavy and compact according to space occupied than reclining chairs, and it is difficult to conceive how reclining chairs

could have the backs folded forward over the chair and crated in such manner, as to occupy so little space and at the same time furnish so much weight according to space as these surgical chairs. The latter are also much heavier than the average barber and dental chairs. After consideration of all the evidence, the Commission reached the conclusion, that first class, or a rate of 63 cents per 100 pounds from Canton to Boston, would be a reasonable rate on surgical chairs when partly knocked down and shipped at owner's risk, crated, in less than carload quantities; that if shipped at carrier's risk when so crated, a first-class-and-one-half rate, or 94 cents per 100 pounds would be just and reasonable between these points; and that the same classification adapted to other and shorter distances in the Trunk Line Classification territory reached by these carriers, making the rates proportionately lower where the distances are shorter than from Canton to Boston, or higher where they are longer, would be just and reasonable.<sup>1</sup>

In a proceeding to correct a classification by the initial carrier of freight which, before reaching its destination, must pass over the roads of several carriers, all such carriers should be made parties; but if the initial carrier alone is made defendant the proceeding is not therefore defective. Every carrier is held liable for correctness of weight and classification of freight received so far as same can be practically ascertained.<sup>2</sup> Violation by one carrier of principles governing relative rates on competitive articles does not justify similar violations by its competitors.<sup>3</sup> A shipper of freight claiming under a contract of shipment, which he procured by false representations as to the class to which the freight belonged, thereby obtaining a lower rate than he would have obtained had it been properly classified, cannot set up that the higher rate sought to be recovered upon discovery of the fraud is an unjust discrimination and therefore unlawful.<sup>4</sup> If the classification operates uniformly, the court cannot decide whether it was the best that could

<sup>1</sup> *Harrard Co. v. Pennsylvania Co.* 3 Inters. Com. Rep. 257.

<sup>2</sup> *Hurlburt v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 81.

<sup>3</sup> *Squire v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 515.

<sup>4</sup> *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* 1 Tex. Civ. App. 553.

have been made.<sup>1</sup> Where an existing classification and rate are not shown to operate injuriously to the carriers from a given point, or to give undue advantage to shippers, a change is not justifiable that materially injures an important industry and a class of shippers at that point, who have there built up the industry in reliance on a continuation of the previous classification and rate, first established and long maintained by the carriers themselves without complaint from any quarter.<sup>2</sup> But an assurance by the carrier, that if one will locate in business on its line his property shall be taken for transportation as belonging to a specified class, cannot bind the carrier so as to compel a classification accordingly. A right to special rates cannot be made out in this way.<sup>3</sup>

In arranging the classification of articles of commerce, their market value, and the shippers' representations to the public as to their character, may properly be taken into account in ascertaining the analogy they bear to other articles, and determining the class to which they justly belong. This is especially applicable to articles in which there is no free competition among producers and shippers. And carriers are not required to estimate the intrinsic value of freight as distinguished from its commercial value for purposes of classification and rates. The volume of traffic supplied by an article for transportation is also an element that may be considered in its classification, as a basis for rates that are reasonable both for carriers and shippers. Patent medicines manufactured and shipped, are rated in the official classification as first class for less than carloads, and third class for carloads. Ale, beer and mineral water, are rated as third class in less than carloads and fifth class in carloads. The market value of the medicines is three times or more higher, than that of the other articles named, and the quantity transported much less. Upon complaint made that the patent medicines should be classified the same as ale, beer and mineral waters, the commission ruled that in view of the much higher market value of the medicines, and the smaller

<sup>1</sup> *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56.

<sup>2</sup> *Butes v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 715.

<sup>3</sup> *Hurlburt v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 81.

volume of traffic they supply, a higher classification than for the other articles named, in which there is much greater competition among shippers, is not unreasonable, and the classification at present in force is not shown to be unjust.<sup>1</sup> A manufacturer's description of an article to induce its purchase by the public also describes it for transportation, and carriers may accept his description for purposes of classification and rates. Carriers are not required to analyze freight to ascertain whether it is in fact inferior to the description or public representations under which it is sold, in order to give it a lower rate corresponding to its actual value. Upon complaint by a manufacturer of soap, advertised and sold as toilet soap, charging unjust discrimination by classifying his product in the second class with other toilet soaps, and not in the fourth class with laundry soaps, as he claims it should be classed, for the reason that his toilet soap is not substantially superior to soap put on the market by certain other manufacturers as laundry soap, which, under that description, is transported at a lower rate, it was held that his description of his product for commercial purposes as an article of superior grade and value, warrants its classification accordingly, and carriers are not required to classify and transport it as a laundry soap.<sup>2</sup>

In *Proctor v. Cincinnati, H. & D. R. Co.* the complainants were large manufacturers of common soap at Cincinnati, Ohio. In the official classification common soap stands in the fifth class in carload lots. The defendant railroad companies have always given it the rate of fifth class articles, but for many years prior to May, 1889, they charged the complainants for only net weight, the gross weight being one sixth more than net weight, but since said date they have charged for gross weight without diminishing the rate per hundred pounds. The effect of this was to charge one sixth more for the same service than had before been charged. The charge for transportation under the net weight practice was reasonable and just, and without complaint on the part of shippers or carriers, and the increased charge by the device of charging

<sup>1</sup> *Warner v. New York & H. R. R. Co.* 3 Inters. Com. Rep. 74.

<sup>2</sup> *Andrews Soap Co. v. Pittsburg, C. & St. L. R. Co.* 3 Inters. Com. Rep. 77.

for the gross weight, being one sixth advanced for the same service, was found to be unwarranted, as it operated to make the rate unreasonable.<sup>1</sup> Pearline must be placed in the fifth class freight in classification of Southern Railway & Steamship Association, and relative difference in rates on pearline and common soap must not exceed difference of sixty cents per 100 pounds on pearline, and thirty-three cents on common soap.<sup>2</sup> The classification of petroleum oil and its products in car loads, adopted and generally applied by carriers, is the same; and the rates upon oil and its products should correspond with their classification and be alike.<sup>3</sup> Rates established for the purpose of keeping up a line of road material (as railroad ties) for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified. The classification of railroad ties in a different class from other lumber, thus imposing a higher rate upon ties than upon other lumber, is an unjust discrimination.<sup>4</sup> Classification of coals as gas coal and common coal is, under the facts of the case, improper.<sup>5</sup> A greater freight rate may properly be charged on commercial coal than on railroad coal which is of inferior grade, the run of the mine, is carried in the cars of the purchaser, and is mined and shipped when the demand is small for commercial coal, so that the mines are kept open and the laborers employed.<sup>6</sup> Under a classification which puts lumber in carloads in the sixth class, and unfinished wagon materials in the fifth class, hub-blocks prepared to be sold to the manufacturers of hubs and of wheeled vehicles, but upon which only so much labor has been expended as is needful to put them in a condition for seasoning, are regarded as raw material, and belong, when not otherwise specified in the classification sheet, with lumber, instead of unfinished wagon materials.<sup>7</sup> The rates charged on "household goods" will not be declared unlaw-

<sup>1</sup> *Proctor v. Cincinnati, H. & D. R. Co.* 3 Inters. Com. Rep. 131.

<sup>2</sup> *Pyle v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 767.

<sup>3</sup> *Rice v. Western New York & P. R. Co.* 3 Inters. Com. Rep. 162.

<sup>4</sup> *Reynolds v. Western New York & P. R. Co.* 1 Inters. Com. Rep. 685.

<sup>5</sup> *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39.

<sup>6</sup> *Louisville, E. & St. L. Consol. R. Co. v. Crown Coal Co.* 43 Ill. App. 228.

<sup>7</sup> *Hurlburt v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 81.

ful on the mere fact that as a condition of granting them the defendants require the shipper to release all claim for damages in case of loss to the amount of \$5 per 100 lbs., or \$1000 per carload of 20,000 lbs., there being no proof showing that such rates are unreasonable in view of said limitation.<sup>1</sup> A carrier cannot justify an unjust or unreasonable charge by observing the classification and rates of a published schedule, under the Arkansas Act of March 24, 1887, prohibiting unjust discrimination in charges and the making of unjust or unreasonable charges. That its rate upon stone is but  $4\frac{1}{2}$  cents, may be considered by the jury in determining whether a rate of 8 cents on brick is unjust and unreasonable.<sup>2</sup> A mixed carload rate for cereal products or for cereal products and flour, that would have the effect of throwing out of the trade many competitors of complainant who manufacture only certain kinds of cereal products, and of centralizing the business in the hands of one or more dealers, should not be granted when, without it, no wrong is done to any one and the market is open to all competitors.<sup>3</sup>

The use by carriers of different freight classifications, the effect of which is to increase the revenue from local traffic as compared with that obtained from through traffic, is as much a violation of the Act, § 4 (the long and short haul provision) as would be the imposition of a higher tariff upon the same class in the same classification. The difference in classification adopted by the "western classification" (which applies to business from the Pacific coast to all points west of the Missouri river) between "raisins" and "dried fruits," by which a higher carload rate is imposed on raisins than on other dried fruits, while by the "Pacific coast east bound classification" (which applies to business over the same roads from the Pacific coast to points on the Missouri river and east thereof) such distinction is not imposed,—is, in connection with the different rules of the two classifications as

<sup>1</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>2</sup> *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65.

<sup>3</sup> *F. Schunacher Milling Co. v. Chicago, R. I. & P. R. Co.* 4 Inters. Com. Rep. 373.

to mixed carloads, an unreasonable discrimination.<sup>1</sup> A discrimination between the rate on corn and its direct products, which subjects persons engaged in the business of manufacturing and selling such products to unreasonable prejudice or disadvantage, and which is without necessity or advantage to the carrier, or any reason founded on the character or condition of the traffic,—is in violation of the Act to Regulate Commerce, § 3, notwithstanding the rate on corn is open to all persons equally and with equal service.<sup>2</sup> Grain and grain products classified alike are presumptively entitled to equal rates.<sup>3</sup> While the difference in cost to the carrier in transporting cereal products and flour, is not in itself sufficient to warrant a higher classification upon cereal products, the facts that these products range higher in value than flour, while in the matter of volume of traffic afforded there is a very wide difference in favor of flour, are some of the conditions compelling a low rate upon flour which do not apply in the transportation of cereal products.<sup>4</sup> Celery should be classed with cauliflower, asparagus, lettuce, green peas, string beans, oyster plant, egg plant, and other vegetables enumerated in Class C of the Western Classification, rather than with berries, peaches, grapes, and other fruits specified in Class III. thereof. Mixed carloads of celery and cauliflower, or other vegetables in the same class, should be transported at no higher rate per carload, than for a carload quantity of either.<sup>5</sup> No unjust discrimination results to the carload shipper of eggs from the equal rating of carload and less than carload lots, and the special service rendered in gathering and forwarding small shipments in "pick-up" cars, where for carload shipments ice to the amount of 6000 pounds is furnished by the carrier without extra charge.<sup>6</sup> Salt is an article which requires and gets a commodity rate lower than class rates, and the general rule applicable thereto would seem prop-

<sup>1</sup> *Martin v. Southern Pac. Co.* 2 Inters. Com. Rep. 1.

<sup>2</sup> *Bates v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 715.

<sup>3</sup> *McMorran v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

<sup>4</sup> *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.* 4 Inters. Com. Rep. 373.

<sup>5</sup> *Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.* 4 Inters. Com. Rep. 318.

<sup>6</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

erly to be that, if it has been placed at commodity or lower than class rates, the only limitation upon the roads should be that the commodity should not be carried at entirely unremunerative rates, so as to impose burdens upon other articles of transportation to recoup loss incurred in carrying the commodity. There is no sufficient similarity between salt and grain to make a comparison in any degree instructive. Salt moves in quantities sufficient to supply the entire demand, from widely separated points of production to common intermediate points of consumption. Grain moves, as a rule, in one direction only to the general markets of the world, and the demand is practically unlimited. The markets for grain will usually absorb the entire supply, and the lowering of rates on grain inures largely to the producer of grain. A reduction in salt rates to the interior of Iowa and Missouri could not have such an effect. The market is necessarily limited. Disturbing rates would lead to corresponding reductions as to the other competing field, so that a reduction will not give any profit, or any greater market in the end to the Kansas producers. Natural causes and forces ought to have full sway. The public mind has condemned what it has believed to be the attempt of railway managers to interfere with them. Commissions and other bodies in regulating transportation should, as far as possible, avoid the same error.<sup>1</sup>

An interesting and instructive case involving the classification of wheat and wheat flour was considered by the Interstate Commerce Commission. The case is altogether peculiar. Originally brought by millers of St. Louis against certain carriers engaged in transporting wheat and wheat flour into Texas, it in fact represents the milling interests of Missouri and Kansas, and, by the intervention of the millers of Texas, has broadened into a controversy between the first-named millers on the one hand, and the last-named millers on the other hand. The carriers that are the nominal respondents upon the record, in the main support the contention of the Texas millers. The essential fact upon which the controversy turns is undisputed. This is that

<sup>1</sup> *Anthony Salt Co. v. Missouri Pac. R. Co.* 4 Inters. Com. Rep. 43.



the carriers make a differential of five cents a hundred pounds in the charge for the transportation of wheat and wheat flour into Texas, the rate on wheat being 46 cents a hundred pounds, and on flour 51 cents a hundred pounds. These rates are grouped for the whole wheat and flour producing territory in Missouri and Kansas, and for all the competitive points in Texas to which those goods are carried, without regard to differences in distance. Neither the amount of the rates nor the grouping method employed is called in question, and the differential alone is challenged. Only the relative reasonableness of these rates is therefore to be considered. The carriers and the Texas millers substantially agree in presenting the reasons relied on as a justification for this differential. These reasons relate in part to the interests of the wheat growers and millers of Texas, and in part to the interests of the carriers. The principal reasons assigned are in substance as follows: The difference in the value of the wheat and the flour manufactured from the grain. It is claimed that because flour is a manufactured article, and of greater market value, it can legitimately bear a higher transportation rate, and that this principle is generally applied. The difference in the quantity constituting a carload, by reason of which the carrier receives a considerably larger revenue from an average carload of wheat at the reduced rate of 46 cents than from an average carload of flour at the rate of 51 cents per hundred pounds, and that the relation of revenue to service for the use of the same kind of car warrants the difference in rate on the two commodities. The increased business that accrues to the Texas carriers as a result of and incidental to the carriage of wheat from without the state to Texas mills, in the subsequent haul of flour from the mills to Texas points, and also in hauling to the mills necessary supplies for carrying on their operations, such as mill machinery, fuel, cooperage, sacks and other things. The importance of maintaining the Texas mills in order to afford a market for the increasing quantity of wheat grown in Texas, which could not be marketed to advantage if it had to be shipped out of the state. The milling business in Texas is claimed to be an essential concomitant of wheat production, a pursuit in which many of

the inhabitants are engaged, and of growing importance. Without these mills to furnish a local market, wheat production would, except in cases of failures of crops elsewhere, be unremunerative. It is said, and the evidence tends to support the statement, that without the differential the Texas mills would not be able to compete with the more northern mills. The Texas millers insist that a larger differential than five cents per hundred pounds is necessary to maintain their competition successfully with the northern mills, and that the difference should be not less than fifteen cents to afford them a reasonable margin of profit. The carriers say, in substance, that the differential of five cents per hundred pounds is a compromise between the rival claims of the Texas millers and wheat growers on the one hand and the millers in Missouri and Kansas on the other hand, and that it has been established after hearing the claims of both sides, and careful consideration of the subject with the view of an equitable arrangement that would not be unjust or unduly prejudicial to the interests of any of the parties. There is no doubt that under the general rule of classification in most parts of the country, wheat and wheat flour, are classified alike and carried at the same rate. This is especially the case upon shipments of those articles from the West to the Atlantic seaboard and intermediate points; but, as is shown in the statement of facts, the rule is not universal, and, besides the extensive area in question, comprising most of three large states, a difference of from four to six cents per hundred pounds is made upon shipments into the very considerable territory of the Southern Railway & Steamship Association, and a greater difference—20 to 40 cents—is made upon the local shipments within the state of Texas.

Whatever the reasons may be for these differences, and without reference to the adequacy or inadequacy of the reasons, the differences in fact exist as exceptions to the general rule of classification, and are not of recent creation, but have existed and business has been done under them for at least fifteen years. Until about four years ago the difference was 15 cents a hundred pounds. The change made has therefore been favorable and not prejudicial to the northern mills. That it might be better in the main to have

one uniform rule is conceded, and this may become necessary in case the new uniform classification shall be applied, but that there may be some justifiable exceptions to a general rule cannot be denied, and in view of the diversified conditions of the country, it can scarcely be assumed that it cannot be shown by evidence that an exception in some one or more localities is reasonable, and that it will not necessarily work unjust discrimination. When a rigid application of a general rule will work injuriously to important public interests, an exception that will mitigate the evil and result in no practical injustice is reasonable. The only question important to consider is whether the differential in question works unjust discrimination against the complaining millers. This, under the statute, is purely a question of fact. A statute may define what shall be deemed unjust discrimination, and when that is done the particular act so defined must be held to be unjust discrimination as a matter of law.<sup>1</sup> But in a case like this it is altogether a question of fact. Assuming that as a general rule wheat and wheat flour should have the same classification and rate, the differential in question is undoubtedly a discrimination, but it does not follow that the discrimination is unjust under the particular circumstances and conditions. As was said in the Report of the Senate Committee of 1886, page 183: "In the practical management of a railroad, whether by the strongest government or by a corporation, it is found impossible to avoid the exercise of discrimination, and, in consequence, the courts have always recognized the distinction between justifiable and unjust discrimination. Whether the discrimination practiced in any given instance was allowable, or unwarranted, is a question that can be fairly determined only by understanding the trade conditions, and special circumstances, that influence and govern the action of the railroad managers in that particular transaction. These are of almost infinite variety and frequently beyond the observation of those without practical experience in railroad management."

The discrimination in this case is professedly founded upon the trade conditions and special circumstances that exist in the localities

<sup>1</sup> *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97, 6 Nev. & McN. 133.

where the discrimination applies. The rival and competing mills that are parties, nominally or practically, to the controversy, in fact exist, and have a right to exist and carry on business if that can be done without undue prejudice to the rights of others. The wheat growing industry of Texas is also an existing fact, constituting a large occupation of the inhabitants, increasing in quantity and in acreage in considerable volume, and it is in the public interest that this industry should have fair opportunity for development and remunerative existence. The carriers, recognizing the facts of the situation, applied the method, neither uncommon nor necessarily unlawful, of a differential adapted to the circumstances, and for a long time have maintained a higher though gradually decreasing rate on flour brought into the state from other portions of the country than on the grain. This, it is said, has served as a factor in developing the milling business, which in turn created a local market for Texas wheat. In support of this adjustment it is said that an equal rate gives undue advantages to millers without the state near the wheat supply, and that the differential tends only to equalize more nearly the trade conditions, and involves no unjust discrimination. If the effect were to enhance materially the price of flour to consumers in Texas, objections on public grounds might be made. But no complaint has come from consumers, and the evidence shows that the price of flour has decreased in Texas as it has elsewhere. Nor is there any claim that the growers of wheat in Kansas and Missouri are injured. The sales of their wheat in Texas necessarily benefit them. The contention is between the millers of the respective territories, and it is quite evident that the Missouri millers are affected fully as much, if not more, by the competition of Kansas millers, as by the conditions in Texas. As an incident of the case, but without affecting its disposition, it may be said that from the carriers' standpoint solely, there is reason to believe that the differential is advantageous to their interests. They earn more revenue on a carload of wheat than on a carload of flour carried into Texas. Their business is to some extent increased by the second haul of flour from the Texas mills, and by the carriage of necessary supplies to those mills. On the other hand, it is to

be observed, the complaint is not against a newly created state of affairs, changing for the worse the conditions under which business has been carried on, but the conditions have in fact existed for many years without complaint, although the differential until about four years ago was three times the present amount. The complaint is therefore against a long standing condition existing now only in a greatly modified form, and which does not have the effect to exclude the northern mills from the Texas markets. The testimony fully shows that the northern mills, under the differential, are able to compete with the Texas mills on terms that are not unduly advantageous to the Texas millers, and that, of the large amount of flour needed for consumption in Texas beyond that produced from Texas wheat, at least one half is carried into Texas in the form of flour. The Texas miller pays  $128\frac{8}{10}$  cents freight on 280 pounds of wheat to produce a barrel of flour of 196 pounds, and 79 pounds of bran and screenings, and there are five pounds of waste. The northern miller pays 102 cents freight on 200 pounds for a barrel of flour. This leaves, at the rates charged, a difference of  $26\frac{8}{10}$  cents a barrel in favor of the northern miller, between the transportation charge on the quantity of grain necessary for a barrel of flour and on the flour itself. Bran and screenings have a market value in Texas only about equal to the cost of their transportation. At St. Louis they can be profitably marketed. The local Texas rate on flour from the mills to competitive points in that state, of 23 cents a hundred pounds, and the local rates on wheat to the mills in Missouri and Kansas, which range from 10 to 20 cents a hundred pounds, are factors in the general situation, and upon a fair balance of all the elements involved, it was considered by the commission, that an approximately equitable result seems to have been reached in the difference between the rates in question.

Considered as a question of fact, therefore, the adjustment of this differential, it is said, does not appear upon the evidence before the commission to have resulted in unjust discrimination against the complainant or the millers similarly situated to themselves. The general effect of the differential seems only to be to place the competitive milling interests upon a substantial parity.

Both undoubtedly make less profits and have less business than if the competitors of either did not exist, but the question is not whether either of the parties shall have a monopoly of the business and therefore higher profits, but whether, as both legitimately exist and have lawful right to pursue the business in which they are engaged, they shall be put upon a substantial footing of equality by an arrangement that allows some profit to both and enables them to compete on relatively equal terms. Upon this aspect of the case, the commission stated its inability to discover, upon the showing made, that, as matter of fact, unjust discrimination resulted from the differential of five cents per hundred pounds, and it would not, therefore, pronounce it unlawful.

The larger question, that a higher rate on wheat flour than on wheat is an unlawful interference with the freedom of interstate commerce, is not understood to exist in this case. Such a question might arise if a state attempted to impose a burden on an article of commerce coming into it from another state. It is not seen how it can arise in respect to the exercise of the national authority. Interstate commerce is under Federal jurisdiction, and the rates on interstate traffic may be regulated by Federal authority with reference to trade conditions and the circumstances of localities without infringing any of its rights or immunities under the Constitution. The absolute power of regulation is in Congress, and the only freedom of commerce is the freedom from other burdens or regulations than those imposed by Congress or pursuant to its authority. A common carrier cannot be required to move interstate traffic without the payment of reasonable charges for its service, and can exact only a reasonable charge from the traffic. The reasonableness of the charge may depend on a variety of considerations, and the relations of one article to another, or of one locality to another, may be among these considerations. The relative reasonableness of rates is therefore part of the domain of Federal regulation. If it is reasonable in view of the carrier's service and earnings, or for public considerations, that grain and its products should have the same rate, or should bear different rates, it is the province of regulation to determine the question. It may be reasonable that the same article shall be

carried at one rate in one part of the country, or on one road, and at a different rate in another part of the country or on another road. But different articles, though analogous in some respects, are not necessarily to be carried at the same rate. Wheat and flour are not the same commercial articles. The process of manufacturing converts the grain into an article for household use, and a new value is given to it. This new article cannot be said to be of right entitled to the same rate as the natural berry from which it has been made. For carriers' reasons, which in most cases are reasons of expediency, they have been classified alike in most parts of the country, but whether this has been done by the rail carriers by reason of the competition of water carriers, or to develop the milling of flour in or near the centres of wheat production, or on account of foreign markets, or because they believe it to be right, does not appear, and is not material to this controversy. The right to an equal rate on flour and wheat must first be shown before a higher rate on flour can be declared unlawful. This question of right was the question in dispute in a recent case. Without discussing the abstract question, the commission considered it sufficient for the purposes of this case to determine that on the facts disclosed no actual injustice has been found in the existence of a rate five cents a hundred pounds higher on flour than on wheat in the territory in question.<sup>1</sup>

The evidence disclosed another feature in the case, however, that required of the commission separate consideration. It appears that in every year the carriers made very considerable reductions in the rate on wheat without making simultaneous reductions in the rate on flour, and that in such instances the differential would sometimes be fifteen cents per hundred pounds, or even more. This does not appear to have been accidental, but to have been intended by the carriers, and the great disparities in the rates were allowed to exist at times for a number of days and at other times for a month or more. The effect of the failure to make the reductions simultaneous was undoubtedly seriously prejudicial to the northern millers, and practically excluded

<sup>1</sup> *Kauffman Milling Co. v. Missouri Pac. R. Co.* 3 Inters. Com. Rep. 401.

them from the Texas market. No circumstances in justification, or even in extenuation, of this practice were shown, and the commission found that this practice worked unjust discrimination against the complainants and others situated as they were, and was unlawful. It also found that under present conditions a discrimination exceeding five cents a hundred pounds is unjust.

The general conclusion reached by the commission upon the whole case, was that the complaint was not sustained as to a differential of five cents per hundred pounds, but it was sustained as to a differential exceeding that amount; and that the respondent carriers should cease and desist altogether from charging or receiving a greater differential upon the carriage of wheat and flour from Missouri and Kansas points to Texas points than five cents a hundred pounds. But the results reached apply only to the situation existing at the present time in the territory in question, and are not intended to lay down any permanent rule for the future, or to be applied in any other territory. The case is disposed of with a view to what is best for the public interests immediately concerned, and upon facts found to exist rather than upon theories of transportation. No question of general policy is involved. An exceptional condition only is presented with relative rates adapted to the condition, and a sudden change in the relations of these rates could scarcely fail to be injurious to important vested interests. The statute contemplates and clearly provides for dissimilar conditions that may affect the making of rates by carriers, and in a proper case of that nature it is no less the duty of public tribunals to recognize dissimilarities that justify exceptional rates than to apply the general principles of the law.

### § 112. *Reasonable Rates for Freight.*

It is not necessary for a shipper to make a special contract with a common carrier in order to entitle himself to transportation for his goods. A common carrier, by virtue of its assuming that position and thereby becoming entitled to the privileges, liens and protections given by statute and at the common law, becomes at the same time bound to carry the merchandise of all, for a reason-



able reward, whenever tendered in the usual way. The difference between a common carrier and a private carrier consists largely in that obligation which arises without special agreement. The compensation of the common carrier is assured to it by a lien upon the goods, a right which is not enjoyed by a private carrier. In case the articles tendered for transportation are not surely worth the freight money, its right to demand payment in advance has long been recognized; its interests are well protected in every direction and it has no right to refuse to accept for transportation, at a reasonable rate, any article of such a nature as it is accustomed to transport, for any person seeking the service,<sup>1</sup> and it is only entitled to a reasonable compensation for transportation of freight.<sup>2</sup>

A common carrier cannot lawfully make unreasonable charges for his services, or unjust discrimination between his customers.<sup>3</sup> But the common law imposes no duty upon common carriers to charge a higher rate for transporting goods a longer distance than like goods a shorter distance.<sup>4</sup> Whether railroad companies combine or act separately in making rates and charges is not important; the essential requirement is that however made they shall be reasonable of themselves, and so fairly adjusted as to be rea-

<sup>1</sup> *Rice v. Cincinnati, W. & B. R. Co.* 2 Inters. Com. Rep. 594.

<sup>2</sup> *Scoville v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571; *Christie v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 22, 94 Mo. 453; *Root v. Long Island R. Co.* 2 Inters. Com. Rep. 576, 4 L. R. A. 331, 114 N. Y. 300; *State v. Cincinnati, N. O. & T. P. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130; *Bayles v. Kansas Pac. R. Co.* 5 L. R. A. 480, 2 Inters. Com. Rep. 643, 13 Colo. 181; *Illinois & St. L. R. & Coal Co. v. Beaird*, 24 Ill. App. 322; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195; *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *McDuffee v. Portland & R. R. Co.* 52 N. H. 447, 13 Am. Rep. 72; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564; *McNees v. Missouri Pac. R. Co.* 22 Mo. App. 224; *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Kinsley v. Buffalo, N. Y. & P. R. Co.* 3 Inters. Com. Rep. 318, 37 Fed. Rep. 181; *Fitchburg R. Co. v. Gage*, 12 Gray, 393.

<sup>3</sup> *Cook v. Chicago, R. I. & P. R. Co.* 3 Inters. Com. Rep. 383, 9 L. R. A. 764, 81 Iowa, 551.

<sup>4</sup> *Illinois & St. L. R. & Coal Co. v. Beaird*, 24 Ill. App. 322.

sonable in their relations to each other and in their results.<sup>1</sup> Rates should be so relatively reasonable as to protect communities and business against unjust discrimination.<sup>2</sup> The relative reasonableness of rates on shipments from western points to cities on the Atlantic seaboard is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison.<sup>3</sup> Making of freight rates may be affected by a variety of practical considerations, as the sparsely settled character of the country; the articles of freight upon which the railroad must depend as compared with other roads transporting similar commodities through more populous communities; the relation of local and through freights; the mode of shipping and delivering, as wheat from elevators, and wheat in sacks; and expenses of hauling empty cars.<sup>4</sup> A variety of practical considerations must enter into making of freight rates and determine to a great extent whether rates are reasonable.<sup>5</sup> The question of the reasonableness of rates is always a perplexing one; a great variety of considerations are necessarily involved in each instance; theory and conjecture merely are not enough; a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than approximation.<sup>6</sup> On complaint of a relatively unreasonable rate on lumber from Eau Claire to various points on the Missouri river as compared with rates to the same points from La Crosse, Winona, and various other

<sup>1</sup> *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.

<sup>2</sup> *Boards of Trade Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 608.

<sup>3</sup> *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754.

<sup>4</sup> *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571; *Missouri Pac. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291; *Greenock v. Southeastern R. Co.* 2 Nev. & McN. 319; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

<sup>5</sup> *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641.

<sup>6</sup> *Howell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162.

lumber shipping points. It was decided that the case must mainly be determined by comparing the rate in question with the rates from neighboring towns, similar in size, situation and volume of competing traffic, and at approximately the same distance from common markets; that the rate complained of subjects Eau Claire to undue prejudice and disadvantage, and is unlawful; and that such rate should not exceed the rate from La Crosse and Winona by more than two cents per hundred pounds when, as at the time complaint was filed, the rate from those points is not over 11 cents per hundred; nor by more than two and one half cents per hundred pounds above the present rate of 16 cents per hundred from La Crosse and Winona.<sup>1</sup> The length and character of the haul, the costs of service, the volume of business, the conditions of competition, the storage capacity and the geographical situation of the different terminal points are all elements of importance bearing upon the relative reasonableness of the respective charges for transportation.<sup>2</sup> A prima facie case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier.<sup>3</sup>

Common carriers may, within the limits of fairness and impartiality, consult their own interests in making contracts for the carriage of goods.<sup>4</sup> As a general proposition where a railroad company is not restricted by charter or statute it may make an arrangement of rates for special purposes on a sufficient consideration, and for the legitimate increase of its business.<sup>5</sup> In the absence of any statutory prohibition or restraint, a common carrier may lawfully demand or contract for such compensation for carriage as he may be able to obtain, without regard to its unreasonableness. Outside of the Interstate Commerce Act there is no law

<sup>1</sup> *Eau Claire Board of Trade v. Chicago, Mil. & St. P. Ry. Co.* 4 Inter S. Com. 65.

<sup>2</sup> *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754.

<sup>3</sup> *Howell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162.

<sup>4</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

<sup>5</sup> *Missouri Pac. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2.

of the United States as a distinct sovereignty, imposing any restraint upon the imposition by a carrier of unreasonable rates. And a state law prohibiting the exaction by carriers of unreasonable rates is, as applied to a contract for shipment from one state to another, an interference with interstate commerce, and cannot be so applied.<sup>1</sup> It is said, that the requirement that a carrier should charge only reasonable rates, does not compel that the charge should be equal as to all persons; and that a contract to one company at reduced rates in preference to others, is not invalid where the charges made to other parties are not unreasonable.<sup>2</sup>

The first section of the Interstate Commerce Act provides that all charges for services, rendered by common carriers subject to the provisions of the law, "shall be reasonable and just," and prohibits and declares unlawful, "any unjust and unreasonable charge." This is the sole requirement of the law, upon the subject of rates, which common carriers subject to the provisions of the law may demand for the transportation of interstate traffic.<sup>3</sup> Section 1 requiring charges to be reasonable, and section 2, forbidding unjust discrimination, apply when exceptional charges are made under section 4, as they do in other cases.<sup>4</sup> The provision in the Act to Regulate Commerce, that all rates shall be just and reasonable, was intended for the protection of the general public, and not for that of the carrier against the action of its own officers or the action of rivals. Under the Interstate Commerce Act, all charges made for any service for the transportation of any passengers or property, or for receiving, delivering, storing or handling property, must be reasonable and just; and no discrimination can be made in rates, charges, or facilities.<sup>5</sup> Less desirable freight must be accepted upon reasonable terms, as well as that which is more desirable.<sup>6</sup> Carriers should bring their tariffs into conformity with the statute, without suggestions from the commission as

<sup>1</sup> *Swift v. Philadelphia & R. R. Co.* 58 Fed. Rep. 858.

<sup>2</sup> *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731.

<sup>3</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

<sup>4</sup> *Re Southern R. & Ss. Asso.* 1 Inters. Com. Rep. 278.

<sup>5</sup> *Cutting v. Florida R. & Nav. Co.* 4 Inters. Com. Rep. 424, 30 Fed. Rep. 663.

<sup>6</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

to details.<sup>1</sup> Railroad companies cannot be required to make freight rates upon mere conjectures.<sup>2</sup> The purpose of the Interstate Commerce Act requires that, when circumstances will fairly admit of it, charges to all points for like service shall be made relatively equal.<sup>3</sup> But the Interstate Commerce Commission cannot compel a railroad company to increase its rates, which are supposed to be so low as to be ruinous to itself or its rivals.<sup>4</sup> A steamship company cannot be required to transport merchandise at a rate which it has made for a short time under circumstances of special competition, where its charges to all shippers are the same.<sup>5</sup> Interstate carriers have power to make commodity class rates and special class rates to meet the circumstances and conditions of traffic along their lines.<sup>6</sup>

In determining what are reasonable rates, the fact that a road earns little more than operating expenses is not to be overlooked, but cannot be made to justify grossly excessive rates. Wherever there are more roads than the business at fair rates will remunerate, they must rely on future earnings for a return of investments and profits.<sup>7</sup> In arriving at what is a just and reasonable rate on freight transported by a carrier on a short local line having but a small volume of business, where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight in the making of the rates, and cannot be overlooked when a question of their reasonableness is involved; and under such circumstances the fact that an independent pipe line from Titusville to Buffalo transports oil between those points at lower rates than the railroad company constitutes no just reason why the railroad company should be required to reduce its rates

<sup>1</sup> *Re Tariffs of Columbus & W. R. Co.* 2 Inters. Com. Rep. 11.

<sup>2</sup> *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641.

<sup>3</sup> *Creus v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>4</sup> *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137.

<sup>5</sup> *Lough v. Outerbridge*, 66 Hun, 103.

<sup>6</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

<sup>7</sup> *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289; *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 298.

to those of the pipe line.<sup>1</sup> Such difference in the cost of the service will justify a carrier in making reasonable differences in its rates.<sup>2</sup> But the difference in rates must bear some proportion to the difference of the cost to carriers.<sup>3</sup> A reasonable rate is one that will make just and fair return to the carrier when it is charged to all who are to pay it without any unjust discrimination against any, and when the revenue it produces is subject to no improper reductions. The test whether a rate upon goods fixed by the railroad commission is just and reasonable is the question whether or not such rates will afford some rate of remuneration to the railroad company.<sup>4</sup>

The commercial necessities of a railway in meeting competition are not to be excluded from consideration, although that alone would not justify a preference, in determining whether, under the English Railway & Canal Traffic Act 1888, § 27, the public interests require the existence of the rates complained of.<sup>5</sup> In the carriage of great staples, rates yielding only moderate profits to the carrier are both necessary and justifiable. Charges for transportation service should have reasonable relation to cost of production and to the value of the service to the producer and shipper, but should not be so low on any as to impose a burden on other traffic. In fixing reasonable rates, the requirements of operating expenses, bonded debt, fixed charges, and dividend on

<sup>1</sup> *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 278.

<sup>2</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 11-24, 16 Am. Rep. 599; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 293; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Ransome v. Eastern Counties R. Co.* 1 C. B. N. S. 437; *Foreman v. Great Eastern R. Co.* 2 Nev. & McN. 202; *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 39; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291; *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306, 18 Am. & Eng. R. Cas. 490; *Burlon Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>3</sup> *Harris v. Cockermouth & W. R. Co.* 1 Nev. & McN. 97-102, 3 C. B. N. S. 693; *Garton v. Bristol & E. R. Co.* 1 Nev. & McN. 227, 3 C. B. N. S. 639; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 185; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 122; *Baxendale v. Great Western R. Co.* 1 Nev. & McN. 202; *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 69.

<sup>4</sup> *Clyde v. Richmond & D. R. Co.* 57 Fed. Rep. 436.

<sup>5</sup> *Liverpool Corn Trade Asso. v. London & N. W. R. Co.* [1891] 1 Q. B. 120, 9 Ry. & Corp. L. J. 83.

capital stock from the total traffic, are all to be considered; but the claim that rate is to be measured by these as a fixed standard is subject to some qualifications, one of which is the obligations must be actual and in good faith. The rate of compensation which railroad companies may lawfully receive for transportation services cannot be so limited that the shipper may in all cases realize actual cost of production. Where carriers frequently put in force and continue for considerable periods of time tariff of rates and charges, it is a fair inference that such rates and charges are profitable.<sup>1</sup> It has been said that the test of the reasonableness of a rate for freights is not the profit of the company, but what is a reasonable rate to be charged to the person making the payment.<sup>2</sup> But in passing upon the reasonableness of rates the question whether they afford the carrier a proper return for the service rendered is to be considered, as well as the result of the business to the shipper or producer of the traffic. Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier, and to the commercial value of such traffic.<sup>3</sup> Competitive commodities are entitled to relatively reasonable rates for transportation, proportioned to each other according to the respective costs of service.<sup>4</sup>

But reduced rates at points where competitive influences are controlling must not fall below some revenue from the traffic in excess of cost; and higher rates at other points, required for the necessary revenue of a carrier, must be reasonable in themselves and also relatively reasonable in comparison with the competitive rate.<sup>5</sup> That at a certain time an article cannot be profitably shipped at existing tariff rate is not conclusive evidence that that rate is unreasonable. The fact that long haul traffic will only bear certain rates is no reason for carrying it for less than cost at expense of other traffic.<sup>6</sup> When an article of traffic does not

<sup>1</sup> *Re Alleged Excessive Freight Rates & Charges on Food Products*, 3 Inters. Com. Rep. 98.

<sup>2</sup> *Canada Southern R. Co. v. International Bridge Co.* L. R. 8 App. Cas. 723.

<sup>3</sup> *Loud v. South Carolina R. Co.* 4 Inters. Com. Rep. 205.

<sup>4</sup> *Squire v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 515.

<sup>5</sup> *Lehmann v. Southern Pac. R. Co.* 3 Inters. Com. Rep. 80.

<sup>6</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

move on account of burdensome rates, and the carrier is hauling a considerable number of empty cars in the direction such article would naturally move if accorded a lower rate, the carrier may be justified in carrying at a rate sufficient to induce the movement of such traffic, provided no extra or additional charge is in consequence put upon other articles carried; but the fact that freight will furnish return loads for empty cars is not a reason for the reduction of rates on such freight, when it does not appear that the rates are unreasonable.<sup>1</sup> The element of value in the commodity transported is taken into consideration in the establishment of a rate, since the greater the value the greater the carrier's liability as an insurer of freight. But the reasonableness of a carrier's rate is not necessarily to be determined by the question of the profit or loss which the producer receives upon his product,<sup>2</sup> all the surrounding circumstances and conditions must be considered as well as the rights of the shippers.<sup>3</sup> When the reasonableness or relative reasonableness of charges is challenged, every material consideration which enters into the making of such charges, including the apportionment thereof to connecting roads in a through line, is pertinent to the inquiry.<sup>4</sup> The question of relative injustice must be viewed upon broader grounds than a mere balancing of one rate against another. A reduction of rates which will throw into confusion an adjustment of rates over a large section of country, which are claimed to be unreasonable of themselves, should not be required unless a clear right thereto exists under some direct provision of the law.<sup>5</sup>

In the recent case of *Reagan v. Farmers Loan & Trust Co.* in the U. S. Supreme Court, decided May 26, 1894,<sup>6</sup> the bill was filed by a second mortgagee. The railroad company was made a defendant, and filed a cross bill. Each of these bills contains a

<sup>1</sup> *F. Schumacher Milling Co. v. Chicago, R. I. & P. R. Co.* 4 Inters. Com. Rep. 373.

<sup>2</sup> *Florida Fruit Exch. v. Savannah, F. & W. R. Co.* 4 Inters. Com. Rep. 400.

<sup>3</sup> *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

<sup>4</sup> *James v. Canadian Pac. R. Co.* 4 Inters. Com. Rep. 274.

<sup>5</sup> *Rend v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 313.

<sup>6</sup> 154 U. S. 362, 38 L. ed. 1014.



general averment that the rates are unjust and unreasonable. That in the original bill, which was filed April 30, 1892, or some six or seven months after the action of the commission, is in these words:

“Eighth. That the classifications and schedules of rates and charges so announced and promulgated in and by said commodity tariffs and circulars of said commission, or sought so to be, as hereinbefore shown, are unfair, unjust, and unreasonable, and that the same cannot be adopted or put or continued in effect by the defendant company or defendant receiver without serious and irreparable loss to it, and serious and irreparable injury to and destruction of the property, rights, and interests of your orator and the beneficiaries of its trust as hereinafter more fully set forth; that the rates so charged and announced by said commission are not compensatory, and are unreasonably low, and the adoption and enforcement thereof would result, as nearly as can be estimated, in a diminution of revenues derived from the operation of said International & Great Northern Railroad, aggregating more than \$200,000 per annum, and that the revenues from said railroad, so reduced and diminished, would be inadequate and insufficient to provide for the payment of the interest upon the prior obligations of the defendant railroad company, recited in paragraph 4 hereof, and the interest upon the second mortgage bonds secured by said mortgage to your orator as trustee, after providing for the expenses of operating said lines of railroad and property, and maintaining the same in proper order and good working condition, so that the traffic and business of said road, and of every part thereof shall at all times be conducted with safety to person and property, and with due expedition.”

By the special facts disclosed in the several bills it appears that there is a bonded indebtedness of over \$15,000,000, and in addition capital stock to the amount of \$9,755,000; that the bonds and stock were issued for and represent value, and that the rates theretofore existing on the road were not sufficient to enable the company to pay all the interest on the bonds. At the time suit was commenced the first mortgage bonds outstanding amounted to \$7,054,000, drawing 6 per cent interest; the second mortgage

bonds to \$7,954,000, drawing also 6 per cent interest. The stockholders had never received any dividends whatever upon their investment, but on the contrary (as appears from the cross bill filed subsequently to the commencement of the suit) they had been forced to pay a cash assessment of over a million of dollars, or about 12 per cent of the face value of the stock, for the purpose of providing in part for the interest upon the first mortgage bonds; the holders of those bonds had been compelled to accept, and had accepted, in payment of one half of the accrued and defaulted interest—a sum exceeding \$750,000—deferred certificate of indebtedness bearing interest at the rate of 5 per cent; the holders of the second mortgage bonds had been called upon to fund, and substantially all had consented to fund, passed due interest, amounting to upwards of \$1,250,000, in third mortgage bonds, bearing 4 per cent interest, and they had also been required to reduce, and substantially all had agreed to reduce, the interest on their bonds to  $4\frac{1}{2}$  per cent per annum for the period of six years, and thereafter to 5 per cent per annum. For about three years the road had been in the hands of a receiver, appointed on account of the default of the company in the payment of its obligations. A statement in detail was incorporated in the bill of the earnings and operating expenses of the road during the years 1889 and 1890, and the first nine months of 1891, which was supplemented by a like statement in the cross bill subsequently filed of the earnings and expenses for the entire year 1891 and the first three months of 1892. These statements show the following figures:

“ 1889: Earnings.....	\$3,488,185 14
Operating expenses, exclusive of taxes.....	2,629,452 90
Surplus.....	858,732 24
1890: Earnings.....	3,646,422 33
Operating expenses, exclusive of taxes.....	3,148,245 09
Surplus.....	498,177 24
1891: Earnings.....	3,648,641 79
Operating expenses, exclusive of taxes.....	3,093,550 20
Surplus.....	555,091 59
Three months of 1892:	
Earnings.....	759,176 18
Operating expenses, exclusive of taxes.....	829,074 87
Deficit.....	69,898 69”

The bill also contains a tabular statement of the revenue per ton per mile derived from the operation of the road during the years 1883 to 1893, inclusive, as follows:

"Revenue per ton per mile for 1883 (in cents) -----				2.03
"	"	"	1884 -----	1.90
"	"	"	1885 -----	1.71
"	"	"	1886 -----	1.65
"	"	"	1887 -----	1.38
"	"	"	1888 -----	1.33
"	"	"	1889 -----	1.44
"	"	"	1890 -----	1.38
"	"	"	1891 (first nine months)-----	1.30"

The mileage owned and operated by the company within the state of Texas amounts to 825 miles. There had been necessarily expended in cash in the construction and equipment of its road more than \$50,000 per mile and it could not be replaced for less than \$30,000 per mile. There is also this allegation in the cross bill:

"That the lines of railway of your orator's company have at all times been operated as economically as practicable, and that its operating expenses have at all times been as reasonable and low in amount as they could be made by economical and judicious management, and that it has not been possible for your orator to operate said road for less than it has been operated. That for the year ending June 30, 1892, there were employed by your orator's company seventeen general officers, who received during said year an average daily compensation of \$12.64, and, exclusive of its general officers, all of its employes during and for the year ending June 30, 1892, received an average daily compensation of \$2.01, and that at all times your orator has secured the service of its officers and employes as cheaply as practicable, and has employed no more than necessary, and that the above were fair and reasonable rates of pay. That at all times the International & Great Northern Railroad Company has secured all supplies, material, and property, of whatever character, for the operation of its road at the cheapest market price and at as low rates as the same could be secured, and has secured and used no more than actually necessary in the operation of the road."

In the amendment to the cross bill, filed in March, 1893, is given a table showing the actual reductions in amounts received by the railroad company for the transportation of the different classes of goods under the operation of the new tariffs up to August 31, 1892, and amounting to \$159,694.51, and also a table showing the per cent of reductions as to different articles—varying from 5 per cent on cement to 54.90 per cent on grain in carloads. The bill also, in general terms, negatives the probability of any increase in amount of business to compensate for the reduction in rates, a negation sustained by the figures given in the amended bill as to the actual effect upon the receipts. It also contains a general averment that the rates on interstate business would be injuriously affected to an equal amount by reason of the reduction of rates on business within the state.

As against these facts the attorney general presses these matters: In the table in the bill heretofore referred to, showing earnings and expenses during the years 1889 and 1890, and the first nine months of 1891, there is this item, several times repeated, "balance of income account," and this on September 30, 1891, is stated at \$3,795,785.68. Of what this account is composed we are not informed (possibly there was included within it the proceeds of the land grant, which, as we are told, was made by the state to the corporation) but, whatever it includes, it was on January 1, 1889, as stated \$2,612,118.68, which would make the increase of that account during the two years and nine months to be \$1,183,667. Confessedly no interest was paid during those years, and that amounted each year to something like \$900,000, or nearly two millions and a half for the two years and nine months. It is obvious that, no matter what may have been in the bookkeeping of the company included in this account, or how much or from what sources in prior years the road had accumulated this balance the increase during the time stated did not equal the accruing interest. The attorney general also notices the report for the year ending June 30, 1892, made by the company to the railroad commission, a copy of which is attached as an exhibit to the amendment to the cross bill, and from that he tabulates a statement which, as he contends, shows that the earnings

during that year were sufficient to pay the operating expenses and fixed charges. We give the table as he has prepared it:

" Gross earnings from operations.....	\$3,568,690 26
Less operating expenses.....	2,986,204 12
<hr/>	
Income from operation.....	\$582,486 14
To which should be added amounts expended for 'cost of road, equipment, and permanent improvements,' admitted to have been included in operating expenses.....	302,085 77
Dividends on (compress) stocks owned.....	8,020 00
<hr/>	
Total income.....	\$892,591 91
Deductions from Income.	
Interest on funded debt accrued during the year, viz:	
On \$7,954,000 first mortgage bonds at 6 per cent..	\$477,240 00
On \$7,054,000 second mortgage bonds, one month, at 6 per cent.....	35,270 00
On \$7,054,000 second mortgage bonds, eleven months, at 4½ per cent.....	290,977 50
<hr/>	
Total interest accrued.....	\$803,487 50
Rental paid Colorado River Bridge Company.....	14,583 32
Taxes.....	28,951 35
<hr/>	
Total deductions.....	\$847,022 17
<hr/>	
Surplus after paying operating expenses proper, interest accrued on bonds, taxes, etc.....	\$45,569 74"

But this table ignores that which is disclosed in the cross bill, to wit, \$750,000 in certificates of indebtedness, bearing interest at five per cent, and \$1,250,000, third mortgage bonds, bearing four per cent interest, the interest on which sums would exceed all the apparent surplus. These items also appear in the report, under the head of current liabilities, the total balance of which on July 1, 1892, is given as \$3,772,062.94, which sum may not unreasonably be taken as showing by how much the company has fallen short of paying its operating expenses and fixed charges. Again, the sum of \$302,085.77 appears in that table, under the description "Cost of road, equipment and permanent improvements, admitted to have been included in operating expenses," and is added to the income as though it had been improperly included in operating expenses. But before this change can be held to be proper, it is well to see what further light is thrown on the matter by other portions of the report. That states that there were no extensions of the road during that year, so that

all of this sum was expended upon the road as it was. Among the items going to make up this sum of \$302,085.77 is one of \$113,212.09 for rails, and it appears from the same report that there was not a dollar expended for rails, except as included within this amount. Now, it goes without saying that in the operation of every road there is a constant wearing out of the rails and a constant necessity for replacing old with new. The purchase of these rails may be called permanent improvements, or by any other name, but they are what is necessary for keeping the road in serviceable condition. Indeed, in another part of the report, under the head of "renewals of rails and ties," is stated the number of tons of "new rails laid" on the main line. Other items therein are for fencing, grading, bridging, and culvert masonry, bridges and trestles, buildings, furniture, fixtures, etc. It being shown affirmatively that there were no extensions it is obvious that these expenditures were those necessary for a proper carrying on of the business required of the company. Certainly the mere title, under which these expenditures are once stated, is not sufficient to overthrow the facts so fully and clearly shown that the stockholders have never received any dividends; that in order to meet the accumulating interest on the bonds they have had to put their hands in their pockets and advance a million and over of dollars. Those are facts whose significance cannot be destroyed by any mere manner of bookkeeping or classification of expenditures.

Further, the attorney general asserts that there are five trunk lines, of which the International & Great Northern road is one, paralleling each other, and thus dividing the business of the territory through which they pass; that the state of Texas had made large donations of land to railroad companies, and that, as appears from its executive documents, this railroad company had received a donation of 3,352,320 acres to aid in its construction, as well as exemption of all its property from taxation for twenty-five years. He also calls attention to the financial depression which has of late years pervaded every avenue of trade, and adds a table from the report of the commissioner of agriculture of Texas, showing as to different articles produced in that state an increase in the

amount of product and a decrease in the prices received therefor; all of which considerations, he earnestly insists, affect the question of the reasonableness of the rates prescribed.

The court say that none of the matters mentioned in the foregoing paragraph appear in the pleadings or elsewhere in the record, and it is, therefore, doubtful to what extent they may be taken into consideration. If we may take judicial notice of the five parallel roads, must we also assume that the existence of the other four diminishes the business of the International & Great Northern, and that, if they had never been built, all the business which now passes over the five would have been carried by the one? May not the topography of the country be such as to prevent any of the business of the other roads from ever coming to the International & Great Northern, even if, without them, it was obliged to seek water or wagon transportation? May not the building of those other roads have increased the population and business to such an extent that the overflow has, so far from diminishing, really resulted in an increase of the business of the International & Great Northern? If there has been a division of business, has there not also been a competition by which the rates have been reduced, and reduced to such an extent as to forbid the propriety of any further reduction? If we may take judicial notice that the state made a grant of three million and odd acres to the company, must we also take notice of the value of that land, of its sale, and the amount realized therefrom? While undoubtedly there has been lately a period of financial depression, can we take judicial notice of the extent to which that depression has reduced the prices of the products of the state? and is the report of the commissioner of agriculture of the state to be considered as evidence before us, and accepted as substantially correct, both as to product and prices? And if the depreciation of prices, as stated in said report, be accepted as correct, will such depreciation uphold a compulsory reduction of the rates of transportation to such an extent that some of those who have invested their money in railroad transportation receive no compensation therefrom? Is it just to deprive one party of all compensation in order that another may make some profit? They who invest their

money in railroads take the same chances that men engaged in other business do of making profit from the carrying on of their business; and, as appears from other cases submitted to us with this, some of the railroads in the state of Texas have operated at a constant loss. But such possibilities of loss are simply the natural results of all business freely carried on, against which the law is powerless to afford protection. Very different are the considerations which arise when the strong arm of the law is invoked to compel parties engaged in legitimate business, and business which cannot be abandoned at will, to so reduce their charges for service as to make the carrying on of that business result in a continued loss. In the one case the law is powerless to prevent injury; in the other it is used to work injury. Counsel suggest that the state itself may construct and operate railroads, and then may properly make rates so low that the business is done at a loss. They refer to the postal system of the United States which, carried on for the common welfare, not infrequently results in a loss which is made good out of the public treasury. But the parallel is not good. In the case suggested the loss is cast through taxation upon the general public, and all bear their proportionate share of that loss which is incurred in securing a common benefit, while the scope of this legislation is to secure such common benefit at the expense of a single class. The equal protection of the laws—the spirit of common justice—forbids that one class should by law be compelled to suffer loss that others may make gain. If the state were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature. Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value?

The Act of 1853, to which reference has already been made, contained a section looking to the acquisition by the state of the title to railroad property. Section 17 of the acts (Tex. Gen. Laws, 1853, p. 58) is as follows:



“If the legislature of this state shall at any time make a provision by law for the repayment to any such company of the amount expended by them in the construction of said road, together with all moneys for permanent fixtures, cars, engines, machinery, chattels, and real property then in use for the said road, with all moneys expended for repairs or otherwise, and interest on such sums at the rate of twelve per centum per annum, after deducting the amount of tolls, freights, passage money, and all moneys received from the sale of lands donated by the state to said company, with twelve per centum per annum interest on all such sums, then the road, with all its fixtures and appurtenances aforesaid, and all the lands donated to the same by the state and remaining unsold, shall vest in and revert to the state: *Provided*, That the state shall not be required to pay or allow a greater rate of interest on any amount of the money so expended by any company which shall have been borrowed from this state than the state shall have received for the same from such company.”

This section, as will be perceived, provides for the payment of interest at the high rate of 12 per cent on the difference between what the company has paid out and what it has taken in, and to that extent evidences the thought of the state that justice required the return to the builders of railroads of something more than the actual cost as the condition of depriving them of the title. It is only significant, however, as an expression of the thought of the state at the time; for, were the provision ever so unjust, every corporation which, after the passage of the act, invested its money in building a road would do so with the knowledge that that was the condition upon which the investment was made, and could not, therefore, challenge its validity.

And now, the court inquire, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the

construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employes have been paid no more than is necessary to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary the court conclude, to decide, and it does not wish to be understood as laying down as an absolute rule that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is not sufficient business to sustain a road. Doubtless too,

there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But the court does hold that a general averment in a bill that a tariff as established is unjust and unreasonable is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established the stock, which represents two fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations in the judgment of the courts that the decree as entered must be reversed in so far as it restrains the railroad commission from discharging the duties imposed by the act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established.

The principle that the ratio of freight rates decreases with the increase of distance is true when the rates are based upon distance and cost alone, and are not affected by other modifying conditions; the extent of traffic carried, and the character of the country traversed, are to be considered.<sup>1</sup> But the method of

<sup>1</sup> *Lincoln Board of Trade v. Burlington & M. R. Co.* 2 Inters. Com. Rep. 95.

testing the freight rates of a railroad by the rate per ton per mile cannot be considered a controlling rule in determining the reasonableness of rates.<sup>1</sup> It is often impracticable to establish different rates on the same commodity from practically the same locality to the same market, although the distances vary.<sup>2</sup> The fact that a rate in one direction is materially higher than that in the opposite direction does not, as in case of hauls over the same line in the same direction, establish *prima facie* the unreasonableness of the higher rate. This is especially true where the hauls are of great length.<sup>3</sup> But a carrier making higher rates upon shorter hauls upon the same line in the same direction has the burden of proving their reasonableness.<sup>4</sup> Distance is not always the controlling element in determining what is a reasonable rate for railroad service in carrying goods, but there is ordinarily no better measure.<sup>5</sup> Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions of a joint through rate over the same line. Mileage is usually an element of importance, and due regard to distance proportions should be observed in connection with other considerations that are material in fixing transportation charges.<sup>6</sup> A departure from equal mileage rates on different branches or divisions of a road is not conclusive that the rates are unlawful, but the burden is on the company making such departure to show its rates to be reasonable when disputed.<sup>7</sup>

Divisions of a joint rate among the carriers may be inquired into for the purpose of ascertaining, from the divisions, whether a rate unreasonable in itself may not be traced to the inequality

<sup>1</sup> *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41; *Business Mens Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 48; *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115.

<sup>2</sup> *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

<sup>3</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>4</sup> *Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 193; *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137.

<sup>5</sup> *James v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 609.

<sup>6</sup> *McMorran v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

<sup>7</sup> *Northwestern Iowa Grain & S. S. Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431; *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.

of such divisions.<sup>1</sup> Taking the through rate to recognized "basing points," and adding thereto that local rate which will give the lowest combination, is not a proper method of determining a rate, as it treats continuous traffic as consisting of two kinds of service.<sup>2</sup> Where the rate fixed for transportation by statute is "not exceeding five cents per ton per mile, when the same is transported the distance of thirty miles or more, and in case the same is transported for a less distance than thirty miles, such reasonable rate as may be from time to time fixed by the company," the company cannot fix—as a matter of law—a greater rate for the less distance than thirty miles, than the maximum allowed for the full thirty miles.<sup>3</sup> Where the provision in the charter authorizing imposition of rates, is of doubtful meaning, the construction most favorable to the public will be adopted.<sup>4</sup> Where the whole quantity of tonnage, reduced to a common standard of tons moved 1 mile, is divided by the entire receipts,—it gives the average charged at a mean rate. And where the statute limits the average charges for toll and transportation to four cents per ton per mile for freight, the carrier may impose more than four cents per mile on some charges, so that by making others less, the general average shall not exceed four cents.<sup>5</sup> Where the rate on freight "carried over the whole line of its road," furnishes a basis for an additional rate, allowed by statute for the transportation of local freight, it is to be taken as the rate charged on freight taken on at one terminus and discharged at the other, and not the rate for freight brought from or carried to a point beyond the terminal of the road, and it is the rate prevailing at the time of the shipment.<sup>6</sup> The method of testing freight rates by the rate per ton per mile cannot be considered a controlling rule in determining the reasonableness of rates. Comparison of rates under dissimilar circumstances and conditions cannot be adopted as standards in

<sup>1</sup> *Perry v. Florida Cent. & P. R. Co.* 3 Inters. Com. Rep. 740.

<sup>2</sup> *Hamilton v. Chattanooga, R. & C. R. Co.* 3 Inters. Com. Rep. 482.

<sup>3</sup> *Campbell v. Marietta & C. R. Co.* 23 Ohio St. 168.

<sup>4</sup> *Stockton & D. R. Co. v. Barrett*, 11 Clark & F. 590.

<sup>5</sup> *Hersh v. Northern Cent. R. Co.* 74 Pa. 181.

<sup>6</sup> *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559; *State v. Mobile & M. R. Co.* 59 Ala. 321.

arriving at their reasonableness.<sup>1</sup> Transportation charges need not be proportioned to the distances between different points, where those distances are greatly dissimilar.<sup>2</sup> When the reasonableness of rates is in question, charges on long through lines cannot offer just basis for comparison with local rates for relatively short distances.<sup>3</sup> In through rates on long hauls, but not always in local rates, the rate per ton per mile grows less in proportion to the greater distance; while the aggregate of the rate increases in proportion to such greater distance.<sup>4</sup> The Act to Regulate Commerce aids the rule making aggregate charge of transportation of freight less in proportion every hundred miles after the first.<sup>5</sup> The fact that the rates of a railroad company are not established on a mileage basis does not necessarily make out their illegality or injustice.<sup>6</sup> Rates lower than the established tariff are prohibited by law.<sup>7</sup>

A carrier operating parallel lines, and accepting lower rates on one line, should make corresponding charges on the other line, when it is conceded that a given carload rate can be criticised for no other reason than that the same rate is accepted for smaller shipments, that carload rate may be reasonable both in fact and in law, and the circumstance that the lesser quantity is carried at the same rate per hundred pounds affords necessarily no just ground of complaint by the carload shipper. How can the law be violated if the rate is reasonable and all shippers are treated alike? Long continued custom and the methods of transportation in actual use may justify in most cases a lower rate for carload shipments than for smaller quantities, but when a carrier sees fit to apply the same rule for fixing its compensation whether it carries a train load or a ton, what right of the larger shipper is infringed,

<sup>1</sup> *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

<sup>2</sup> *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65.

<sup>3</sup> *Creys v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>4</sup> *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* *supra*.

<sup>5</sup> *Furrar v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 764.

<sup>6</sup> *La Crosse Manufacturers & J. Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 9.

<sup>7</sup> *Re Passenger Tariffs & Rate Wars*, 2 Inters. Com. Rep. 340.

and upon what principle can the action of the carrier be condemned? Under ordinary conditions, of course, the larger the shipment the greater the profit per hundred pounds to the carrier. The carload undoubtedly pays better in proportion to the weight transported than the smaller quantity, when the same rate is applied to both. More than this, the work of loading and unloading is mainly done by the carrier when merchandise is shipped in small quantities, while in the case of carload shipments the loading is usually done by the consignor and the unloading by the consignee. The carrier can afford to take the greater shipment for a smaller rate of compensation. This is partly because the larger shipper, for his own convenience or advantage performs part of the service which it is the carrier's duty to perform, and partly because the greater tonnage can be hauled and delivered at proportionally less expense. But the pecuniary advantage of the carrier is by no means the controlling consideration in determining the just relation of rates. The general public right to equal transportation must be recognized, and that right may be seriously invaded if charges are graduated according to the volume of business. Some of the largest shippers not only do their own loading and unloading, but also provide their own cars, side tracks, warehouses and other facilities for the easy and economical delivery to the carrier of their immense shipments and thus make their patronage peculiarly desirable. Much the same argument which provides a reduced rate to carload shippers would justify a still lower rate as frequently happens by the train load. But no reduction from carload rates in favor of train load shippers would be sanctioned by the Interstate Commerce Commissioners or permitted by the law making power.<sup>1</sup>

Where parcels are packed, a railway company cannot impose the full rate which it might charge if they were shipped separately.<sup>2</sup> Less rate may be charged for furnishing freight in fully loaded trains at regular intervals.<sup>3</sup> A difference in charge is jus-

<sup>1</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

<sup>2</sup> *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411.

<sup>3</sup> *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 306.

tified where the transportation is over steep grades.<sup>1</sup> A difference in bulk will justify difference in rates.<sup>2</sup> Or difference in expense of loading and unloading.<sup>3</sup> Or when return loads could not be had.<sup>4</sup> A carrier should receive a greater compensation in the aggregate for hauling a carload of large tonnage than one of less tonnage, but, other things being equal, as a general rule the rate per hundred weight should be less in the former than in the latter case.<sup>5</sup> Different rates may be charged where shippers own private side tracks and return cars more promptly.<sup>6</sup> The expense of hauling the Burton cars in one direction unloaded, since by their construction they are not suited to carry general freight, and the fact that a large percentage of ordinary cattle cars are hauled back loaded upon long hauls of western roads, are considerations which justify difference in charge against shippers who prefer to hire improved stock cars.<sup>7</sup>

Where a special service is required of the carrier, such as rapid transit and speedy delivery in case of perishable freight, a higher rate than for the carriage of ordinary freight is warranted; and if a carrier charging a rate based on such special service fails to render it, to the damage of the shipper and without legal excuse, the remedy of the latter would seem to be by a proper proceeding in a court of law, and not by a complaint of excessive rates.<sup>8</sup> For a special service by a carrier, such as the transportation of perishable freight, requiring quick movement, prompt delivery at destination, special fitting up of cars, their withdrawal from other service, and their return empty on fast time, all involving greater expense to the carrier, a higher rate than for the carriage of ordinary freight is warranted by the conditions of the service, and is

<sup>1</sup> *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 105; *Nitshill etc. Coal Co. v. Caledonia R. Co.* 2 Nev. & McN. 39.

<sup>2</sup> *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306.

<sup>3</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 26, 16 Am. Rep. 599.

<sup>4</sup> *Chicago & A. R. Co. v. People*, *supra*; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291.

<sup>5</sup> *Murphy v. Wabash R. Co.* 3 Inters. Com. Rep. 725.

<sup>6</sup> *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 102.

<sup>7</sup> *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329.

<sup>8</sup> *Loud v. South Carolina R. Co.* 4 Inters. Com. Rep. 205.



reasonable and just. But the higher rate for a special service should bear a just relation to the value of the service to the traffic, and is not wholly in the discretion of the carrier. While a carrier should be fully compensated, the public interests require that the traffic should not be rendered valueless to the producer if the charges of the carrier have such an effect and can be reasonably reduced. The requirements of the statute that all rates shall be reasonable and just involves a consideration of the commercial value of the traffic, and implies that rates should be so adjusted that producers of traffic as well as carriers may carry on their pursuits successfully, if practicable for both and without injustice to the carrier. The public good requires, what is plainly the spirit of the law, that the transportation interests are not alone to be considered, but that in the just enforcement of regulations care should be taken that the lawful and necessary occupations of citizens are not unjustly burdened. In the case of the *Delaware State Grange of P. of H. v. New York, P. & N. R. Co.* 3 Inters. Com. Rep. 554, the Delaware Railroad Company, the Philadelphia, Wilmington & Baltimore Railroad Company, and the Pennsylvania Railroad Company, the complaint was that the defendants' charges for the transportation of specified perishable articles of truck farming, from stations on their lines of railroad to Jersey City and Philadelphia, were excessive and unreasonable, and that the charges were higher for the shorter distances from their stations on the Peninsula, in Delaware and Maryland, than for the longer distance from Norfolk, Va. It was found that the charges on certain articles specified from stations on the Peninsula were excessive, and a reduction as follows was ordered: On peaches and berries, from all stations on the main line, 20 per cent. On apples, peas, kale, spinach, radishes, cabbages, lettuce, and other vegetables, except potatoes, from all stations north of Delmar, and for apples, peas, and other vegetables, except kale, spinach, radishes, cabbages, and lettuce, from all stations south of Delmar on the main line, 25 per cent. On potatoes, on the main line from all stations 25 per cent. The reduced rates are, however, in many cases still considerably above the rates on the same articles from Norfolk, and the showing not

being sufficient to enable the commission to determine satisfactorily how far the lower Norfolk rates were justified by the difference in the conditions and circumstances, that subject was left for future consideration.

In the cases of Leonard & Chappel against the Chicago & Alton Railroad, complainants were formerly allowed to ship live cattle in carloads from Mt. Leonary, Mo., to Chicago, at \$50 per car and to load twenty into a car. On January 21st last, Leonard offered 180 cattle for shipment in nine cars, but this was refused and he was informed the rate would be 24 cents per 100 pounds for a carload of not less than twenty thousand pounds, and any excess of that number of pounds to a car would be charged for at the same rate. The freight charge was \$599.88 and the cattle were loaded in twelve cars. The main question was whether carriers can rightfully substitute for the practice of charging carload rates on cattle, irrespective of weight, the rule that while a car-lot rate is named a minimum rate for a carload is prescribed, and any excess over the minimum is to be charged for by the hundred pounds in proportion to the car-lot rate. The commission decides that this rule is not unlawful, and being more in proportion to the service rendered, it is *prima facie* more just and reasonable than the practice it supplanted. Upon the hearing it was shown that by state law, or the rulings of state commissions, shippers of cattle in Kansas or Missouri to points within the state had the right to load cars without regard to weight, at a stated price per car. It was said the rule was the same in some other states and the commission was urged to conform thereto. The commission holds that such state action is not a reason for adopting the like rule in interstate traffic, if that course is found not to be most just and politic. The difference between the rate on carloads and that on less than carloads must be reasonable.<sup>1</sup>

Allowing a charge for weight of oil barrels, where shipment in tanks is less dangerous, and also is more likely to result in return loads, does not authorize such a charge as against tank shipments on lines where these conditions do not exist.<sup>2</sup> A tank used in

<sup>1</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>2</sup> *Re Relative Tank & Barrel Rates on Oil*, 2 Inters. Com. Rep. 245.

carrying oil is deemed by carriers part of the car and the rate is charged only upon the contents, while for carriage in box cars the barrels containing the oil are treated as freight and the rate is charged both for the weight of the barrel and its contents. The prevention of this prejudice to shippers in barrels requires that for purposes of rates, when a carrier uses both tank and box cars for carrying oil in earloads, the barrels shall be deemed part of the box car; and that, as in the case of transportation in tanks, the rate shall be charged only for the weight or quantity of oil carried, exclusive of the weight of the barrels, and be the same for like weight or quantity carried in tanks.<sup>1</sup> Charges under the net-weight practice being just and without complaint, an increase by charging for gross weight, being one sixth advance, is unreasonable.<sup>2</sup> A former special and preferred rate is not a fair test of the reasonableness of a present rate of freights under the Act to Regulate Commerce.<sup>3</sup> A railroad company, while long maintaining a rate without the presence of competition on other than equal terms, is making evidence that such rate is not too low.<sup>4</sup>

Comparisons of rates charged by railroad companies under circumstances and conditions substantially dissimilar, cannot be adopted as standards in arriving at the reasonableness and justness of rates.<sup>5</sup> An allegation that freight and passenger rates fixed by railroad commissioners for one road are unjust and unreasonable, when compared with the rates permitted on other lines operating under the same conditions, does not overthrow the reasonableness of the rate, since a rate reasonable for one road may not be so for another, though they are connecting lines.<sup>6</sup> When great disparity exists between charges which are lower to competitive than to intermediate points much less remote, the inference is irresistible that the lower rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted re-

<sup>1</sup> *Rice v. Western New York & P. R. Co.* 3 Inters. Com. Rep. 162.

<sup>2</sup> *Proctor v. Cincinnati, H. & D. R. Co.* 3 Inters. Com. Rep. 131.

<sup>3</sup> *Myers v. Pennsylvania Co.* 2 Inters. Com. Rep. 403.

<sup>4</sup> *Northwestern Iowa Grain & S. S. Asso. v. Chicago & N. W. R. Co.* 2-Inters. Com. Rep. 431.

<sup>5</sup> *Business Mens Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 48.

<sup>6</sup> *Storrs v. Pensacola & A. R. Co.* 29 Fla. 617.

turn for the services rendered.<sup>1</sup> Rates that are just and reasonable from selected manufacturing points east of the Missouri river and west of the Atlantic seaboard, are prima facie just as reasonable from all other points in the same territory.<sup>2</sup> An arbitrary differential added to the rates from Chicago to New York, to make the rate to Boston, was held improper, and a percentage was ordered to be substituted, instead of the arbitrary sum.<sup>3</sup> The relative reasonableness of rates on shipments from western points to cities on the Atlantic seaboard, is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison.<sup>4</sup> The rates on wheat and barley, of fifty and fifty-six cents per hundred weight, respectively charged from Ritzville, Washington, to St. Paul, Minnesota, a distance of 1576 miles, in view of the circumstances and conditions surrounding the traffic, are held not to be unreasonable.<sup>5</sup> The rate on unfinished cheap bedroom sets shipped knocked down from Lansing, Michigan, to Oakland, California, should not exceed eighty-five per cent of whatever rate may be adopted for such sets in a finished condition.<sup>6</sup> The increase of rates for the transportation of oranges from Florida points to northeastern cities over the line of the Savannah, Florida & Western Railway and its connections, which was made Nov. 23, 1890, and amounted to thirty-three and one third per cent upon rates previously in effect,—is unjust, unreasonable, excessive, and in violation of the Interstate Commerce Act; and it is not justified by the increased facilities which have been afforded by the carriers for handling and preserving the fruit.<sup>7</sup> Contracts providing that a complainant may ship coal to points north and west,

<sup>1</sup> *Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 213.

<sup>2</sup> *Re Tariffs of Transcontinental Lines*, 2 Inters. Com. Rep. 203.

<sup>3</sup> *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 830.

<sup>4</sup> *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754.

<sup>5</sup> *Buchanan v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 655.

<sup>6</sup> *Potter Mfg. Co. v. Chicago & G. T. R. Co.* 4 Inters. Com. Rep. 223.

<sup>7</sup> *Florida Fruit Exch. v. Savannah, F. & W. R. Co.* 4 Inters. Com. Rep. 400.

on the same terms and rates that respondent for the time being gives other persons, do not preclude complainant from showing that such rates are unjust, oppressive, or unreasonable. Complainant is therefore entitled to a hearing upon that question before the Interstate Commerce Commission.<sup>1</sup> Charges on anthracite coal, which are higher than on iron ore, pig iron, and other low-grade freight, or on general freight, the expense of carrying which is much greater than the expense on coal, are unreasonable.<sup>2</sup>

Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions of a joint through rate over the same line.<sup>3</sup> An intermediate local rate should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point.<sup>4</sup> Where the rate of freight charges over one line on similar freight carried from neighboring territory to the same market, is considerably greater than over other lines for distances as long or longer, such greater rate is held to be excessive and should be reduced.<sup>5</sup> In the absence of legislative regulation, the courts must decide for the carrier, when controversies arise, what is reasonable.<sup>6</sup> The question of the reasonableness of a rate of charge for transportation by a railroad company, is eminently a question for judicial investigation, requiring due process of law for its determination.<sup>7</sup> Whether the difference in rates for transportation for local traffic and through traffic is reasonable, or unreasonable is a question of fact for the jury.<sup>8</sup> The Interstate Commerce Commission will not determine the relative reasonableness of rates at many stations and in a large extent of territory, upon the mere face of tariffs

<sup>1</sup> *Haddock v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302.

<sup>2</sup> *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

<sup>3</sup> *McMorran v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

<sup>4</sup> *Martin v. Southern Pac. Co.* 2 Inters. Com. Rep. 1.

<sup>5</sup> *James v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 609.

<sup>6</sup> *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56.

<sup>7</sup> *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209.

<sup>8</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 597, affirming 2 Inters. Com. Rep. 540.

and without further proof.<sup>1</sup> Where a case involving the reasonableness of rates has been disposed of by the carrier assenting to the rates demanded, no opinion will be expressed on the rates which have been abandoned, even though the parties request it.<sup>2</sup> The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties.<sup>3</sup> In deciding a case against one or more carriers who are charged with making rates which are unjustly discriminating in a certain line of traffic, the decision made upon the facts of the particular case does not necessarily govern rates in other sections of the country, where the facts bearing upon them may be altogether different.<sup>4</sup> A *prima facie* case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier.<sup>5</sup>

Where no discrimination is alleged as between points of production tributary to the same market, or on account of disproportionate rates on different kinds of traffic similar in character and volume, it must affirmatively appear that charges assailed as unreasonable, are so and ought to be reduced.<sup>6</sup> A reduction of rates by a carrier is not *per se* evidence that the former rates were unreasonable, as such reduction may be accounted for because of a decrease in cost of transportation and an increase in the volume of the traffic to which such rates apply.<sup>7</sup> Whether the difference in rates for transportation for local traffic and for through traffic

*Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 193.

<sup>2</sup> *Lincoln Board of Trade v. Union Pac. R. Co.* 2 Inters. Com. Rep. 101; *Harris v. Duval*, 2 Inters. Com. Rep. 514; *Pennsylvania Co. v. Louisville, N. A. & C. R. Co.* 2 Inters. Com. Rep. 603; *Rawson v. Newport News & M. V. Co.* 2 Inters. Com. Rep. 626.

<sup>3</sup> *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. Co.* 2 Inters. Com. Rep. 289; *Michigan Congress Water Co. v. Chicago & G. T. Co.* 2 Inters. Com. Rep. 428; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102.

<sup>4</sup> *Re Relative Tank & Barrel Rates on Oil*, 2 Inters. Com. Rep. 245.

<sup>5</sup> *Houell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162.

<sup>6</sup> *Lincoln Creamery v. Union Pac. R. Co.* 3 Inters. Com. Rep. 794.

<sup>7</sup> *Loud v. South Carolina R. Co.* 4 Inters. Com. Rep. 205.

is reasonable or unreasonable, is a question of fact for the jury.<sup>1</sup> The burden of proof is on petitioner charging exaction of unreasonable rates.<sup>2</sup> In case of complaint for violation of section 4 of Act, the burden of proof is on the carrier to justify any departure from the general rule prescribed by statute, by showing that circumstances and conditions are dissimilar.<sup>3</sup> The burden of proof is not on the carrier to show that the difference in the charge is proportioned to the saving.<sup>4</sup> The mere fact that a less tariff is allowed by a carrier to one class of shippers, for special reasons applicable to them only, than is applied to all others, is not proof that the rate generally charged is unreasonable.<sup>5</sup> A prima facie case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier.<sup>6</sup> A satisfactory justification must be made where large advances are made on old rates of long standing, where the traffic affected is large and constantly increasing and of vital importance to a large section of country.<sup>7</sup> A carrier cannot justify an unjust or unreasonable charge by observing the classification and rates of a published schedule, under the Arkansas act of March 24, 1887, prohibiting unjust discrimination in charges and the making of unjust or unreasonable charges.<sup>8</sup>

On complaint of an unreasonable rate on butter in less than carloads from Lincoln, Kan., to Denver, Col., it appeared that defendant's line between those points runs through a sparsely populated country, furnishing comparatively little business to the carrier, and also that the rate was common to numerous towns of

<sup>1</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 597.

<sup>2</sup> *Harding v. Chicago, St. P. M. & O. R. Co.* 1 Inters. Com. Rep. 375.

<sup>3</sup> *Re Southern R. & S. S. Asso.* 1 Inters. Com. Rep. 278.

<sup>4</sup> *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 293; *Allen v. Louisville, N. A. & C. R. Co.* 1 Inters. Com. Rep. 621.

<sup>5</sup> *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* 1 Tex. Civ. App. 553.

<sup>6</sup> *Howell v. New York, L. E. & R. Co.* 2 Inters. Com. Rep. 163.

<sup>7</sup> *Railroad Commission of Florida v. Savannah, F. & W. R. Co.* 3 Inters. Com. Rep. 688.

<sup>8</sup> *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65.

importance at an equal or greater distance from Denver, and was maintained by all the roads extending into that territory; it was held that the charge was not shown to be unreasonable, nor did the evidence furnish sufficient reason for interfering with a rate established by a number of roads and common to many communities. Comparison with rates in other localities where dissimilar conditions and modifying circumstances are found, is not sufficient to establish the unreasonableness of the charges complained of. Where no discrimination is alleged as between points of production tributary to the same market, or on account of disproportionate rates on different kinds of traffic similar in character and volume, it must affirmatively appear that the charges assailed are unreasonable and ought to be reduced.<sup>1</sup> Where the agent of a railroad company authorizing a certain rate on a certain kind of freight, the amount to be shipped not being named, is shown to be acquainted with the shipper or receiver, for whose benefit the rate is made, and admits that if he had understood the communication to refer to the kind of freight claimed, he would have taken it to mean a season's supply of such freight, he cannot make the defense that the contract calls for the transportation of only an indefinite quantity, and does not authorize the transportation of a specific large amount, constituting a year's supply.<sup>2</sup> A statute giving railroad commissioners authority to fix joint rates for a railroad, makes the rules thus fixed only prima facie evidence, although not expressly limiting them to that effect, where the only penalties are for charging unjust and unreasonable rates, and a former statute which did not extend to joint rates, and of which this was an amendment, expressly limiting the effect of the commissioner's order as to rates, to prima facie evidence, and there is no uncertainty in such a statute on the ground that it does not permit any charge with certainty of its reasonableness, as the state is precluded from denying that the commissioners' rates are reasonable.<sup>3</sup> A railroad company is not liable to the

<sup>1</sup> *Lincoln Creamery v. Union Pac. R. Co.* 3 Inters. Com. Rep. 794.

<sup>2</sup> *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 38 Fed. Rep. 561.

<sup>3</sup> *Burlington, C. R. & N. R. Co. v. Dey*, 12 L. R. A. 436, 82 Iowa, 312, 45 Am. & Eng. R. Cas. 391.



penalty imposed by New York Laws 1857, chap. 185, as amended, for charging an excessive rate of fare over a spur of road built by it, not as a part of its road, but as an independent and temporary structure from a station on its line to a race track over grounds held by it for other than railroad purposes, and not built under the New York General Railroad Act of 1850.<sup>1</sup> When the refund of an excessive charge by a carrier has been unnecessarily delayed for a considerable period, the officials responsible therefor become fairly chargeable with willful intention to violate the law.<sup>2</sup>

In discussing the question of the binding force of an agreement to carry at a stipulated rate, it has been suggested that a contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is ineffective for the reason that the shipper is under no obligation to ship any definite or designated quantity of grain. But the fact that there is no designation of quantity does not invalidate a contract unimpeachable in all other respects. Possibly such a contract may be revoked, but if acts are done in performance, it is valid at all events as to those acts, for until there is an effective revocation the contract remains in force. A proposal, although revocable in its nature, becomes effective if accepted and acted upon before annulled by revocation.<sup>3</sup> A railroad company, operating a part of a through line which it joins in making, and owning a controlling interest in the capital of another railroad, by which the other part is operated, cannot free itself from responsibility of excessive through rates by getting behind the latter company as a separate carrier.<sup>4</sup>

<sup>1</sup> *Palm v. New York, N. H. & H. R. Co.* 42 N. Y. S. R. 219.

<sup>2</sup> *Phelps v. Texas & P. R. Co.* 4 Inters. Com. Rep. 363.

<sup>3</sup> *Wellington v. Apthorp*, 145 Mass. 69; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488; *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

<sup>4</sup> *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78.

## CHAPTER XVI.

### COMPETITION, DISCRIMINATION AND CONTINUOUS CARRIAGE.

§ 113. *Substantially Similar Circumstances and Conditions.*

§ 114. *What Circumstances and Conditions Influence Rates for Long or Short Haul.*

§ 115. *Competition with Water Carrier; with Foreign Railroads; with Non-Interstate Railroad; in "Rare and Peculiar Cases."*

§ 116. *Long and Short Hauls and Group Rates.*

§ 113. *Substantially Similar Circumstances and Conditions.*

The phrase "substantially similar circumstances and conditions" occurs in both the second and fourth sections of the Act to Regulate Commerce. An intelligent construction of this phrase involves the duty of ascertaining how it originated in the statute. The words "under substantially similar circumstances" were in the discrimination clause of the original house bill reported by the commerce committee of the House of Representatives in 1884. In the Reagan substitute bill the words did not appear, nor were they in the bill as it passed the house in January, 1885. The words "under similar circumstances" were used in connection with discriminations in the summary statement of causes of complaint against the railroad system contained in the report of the senate select committee, presented in 1886; and the phrase "under substantially similar circumstances and conditions" was a part of the second section of the original senate bill which was introduced by Senator Cullom. During the debate upon amendments proposed by Senator Camden and Senator Aldrich, some discussion was being had in regard to the word "quantity." Senator Camden proposed that the words "of a like kind of property under substantially similar circumstances and conditions" be substituted for the amendments offered, and the substitute was

adopted. A short history of the framing of the fourth section is given in the opinion of the commission, in *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278. The words "under similar circumstances" had been put into a short haul provision by the legislature of Connecticut before the Interstate Commerce Law was enacted, and that statute was referred to in the congressional debates. The words "under the same circumstances" are in section 90 of the English Act of 1845, and they and also the words "under like circumstances," have been frequently employed by the courts of England.

Whatever use may have been made in English decisions of the word "circumstances" or of the word "conditions" the value of these decisions as precedents to be followed in deciding cases in this country, depends greatly upon the similarity of the statutory provision governing the English case, to the provision of our law under which the case to be determined is brought. A comparison of certain clauses in English statutes with the second, third and fourth sections of the Act to Regulate Commerce is shown below :

#### EQUALITY CLAUSE.

##### *English Act.*

#### Sec. 90 Railway Clauses Act 1845.

"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties or for the purpose of colusively or unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special act contained from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway,

#### UNJUST DISCRIMINATION CLAUSE.

##### *American Act.*

#### Sec. 2. Act to Regulate Commerce, 1887.

That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic *under substantially similar circumstances and conditions*, such common carrier shall

as they shall think fit; provided, that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, *passing only over the same portion of the railway under the same circumstances;* and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person traveling upon or using the railway.

be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful.

#### UNDUE PREFERENCE CLAUSE.

##### *English Acts.*

Sec. 2. Railway and Canal Traffic Act, 1854.

Sec. 11. Railway and Canal Traffic Act, 1873.

\* \* \* and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. \* \* \*

#### UNDUE PREFERENCE CLAUSE.

##### *American Act.*

Sec. 3. Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

#### THE 4TH SECTION OF THE ACT TO REGULATE COMMERCE.

“That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer, distance; but this shall not be construed as authoriz-

ing any common carrier within the terms of this Act, to charge and receive as great compensation for a shorter as for a longer distance; *Provided, however,* That upon application to the commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act."

The language of the fourth section presents one very important consideration which should always be kept in view, namely: that which will not amount to a justification of the greater charge for the shorter haul under the prohibitory rule of the section may nevertheless warrant the commission in granting a relieving order upon an application for relief under the proviso clause of the section. To stand upon one's right under the law is one thing, and to obtain relief by process of law is another. Ordinarily the commission should not alter the standing of parties in proceedings before it. When upon complaint under the 13th section of charges alleged unlawful under the rule of the fourth section, the carrier avers substantial dissimilarity in circumstances and conditions as justifying the greater charge for the shorter distance, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar. But upon an application under the fourth section proviso the carrier is the petitioner, not the respondent; it is not limited by the terms of the rule and may present to the consideration of the commission every material reason for an order in its favor. And upon investigation of the matter the commission is not confined to issues made by pleadings, but may, among other things, examine into the legality of rates on competing lines. The commission may, for cause shown on such an application, institute on its own motion a collateral proceeding for the purpose of correcting apparently unlawful rates on the competing line, and pending the proceeding grant temporary relief to the petitioning carrier. But it

must not be inferred by this that the commission will entertain applications for relief based on frivolous grounds. The petition or application must make out in statement a *prima facie* case of hardship under the rule, and when the competition of another carrier is the cause of an application to charge less for the longer distance, it must appear therein that traffic considerable in amount will be lost to the petitioning carrier if through action of the commission its situation in regard to such longer distance rate shall not be relieved.<sup>1</sup>

At the time of the enactment of this section no similar provision was contained in any English statute. The Railway & Canal Traffic Act of 1888, after re-enacting the undue preference clause of 1854, also provides in paragraph 3, section 27, as follows: "The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance, than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway." The difference between the English and American acts in respect to long and short hauls, is that there the commission or the court is empowered to prohibit the greater charge for the shorter distance, while here the law itself prohibits the greater charge for the shorter distance when the circumstances and conditions surrounding the transportation are substantially similar, but empowers the commission to authorize the less charge for longer distances. In England a complaint of greater charge for the shorter haul is triable under the undue preference clause, which is nearly identical with a portion of section 3 of our law, and the English commission or court may prohibit such greater charge. But in the United States such a proceeding must be brought under the fourth section of the Act to Regulate Commerce. In either country a complaint of undue preference or prejudice must (prior to the English statute of 1888 which shifted the burden to the carrier) be supported by proof of damage which makes the preference or prejudice unrea-

<sup>1</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 154.

sonable or undue, but in cases brought under our fourth section or long and short haul clause, which particularly describes the act it declares to be unlawful, such proof is not required. A case of undue or unreasonable preference or advantage or prejudice or disadvantage includes, as the terms themselves imply, consideration of all those circumstances and conditions which bear, not only upon the transportation by the carrier, but also often relate to the value and volume of the traffic, the favorable or unfavorable location of the places involved in the controversy, character of grades on different divisions, lateral lines, and other essential elements which enter more particularly into matters of relative services and relative rates.

This undue preference clause may justly be termed an omnibus provision, enacted first by Parliament, and then by Congress, to prohibit carriers from doing any act which unduly or unreasonably puts one shipper or description of traffic up in the scale of favor, or puts another shipper or description of traffic down to his or its disadvantage or wrong. But when the Act to Regulate Commerce was passed, Congress not only adopted that clause, but saw fit to go further, and specify that certain charges by the carrier would in themselves constitute wrong. The second and fourth sections of the Act—that is, the unjust discrimination and long and short haul clauses—are provisions of this character. Under these sections the carrier must not charge more for like service, nor more for less service, rendered in the transportation of a like kind of traffic, under substantially similar circumstances and conditions. These provisions describe the offense, and limit the circumstances and conditions to be considered, to those under which the transportation is conducted. The undue preference clause of the English statute, which was copied into the third section of our law, contains no such description or limitation, nor do the words, “substantially similar circumstances and conditions,” or any of them, appear therein. Considerable variation in language is also found in comparing the English equality clause of 1845, with the second or unjust discrimination clause of our law. That the latter covers much more ground must be apparent to the casual observer, and if it were not for the fact that our

second section contains the phrase "substantially similar circumstances and conditions," and the English equality clause in its proviso has the words "under the same circumstances" no reference or comparison would be deemed necessary. The frequent citation of English decisions in cases affecting interstate transportation, with manifest disregard of vast differences in facts, time, extent of country, methods of trade and transportation and great dissimilarity in statutory provisions, is ample warrant for the above somewhat extended comparison, and for the following examination of some English cases which have been quoted for the purpose of influencing decisions in this country.

The case of *Atty. Gen. v. Birmingham & D. J. R. Co.*, 2 Eng. Ry. & Canal Cas. 124, was recently cited in a case brought under the second section of the Act to Regulate Commerce. The English case was decided in August, 1840. The American case was tried in 1890, fifty years later. The railway in the English case was operated under a special act which contained an equality clause similar to the proviso of section 90 of the English Act of 1845, above quoted. A passenger journeying to London over connecting railways was charged by the first railway for the carriage between two points on its line less than it charged to another passenger who only traveled between the two points on the first carrier's line, but the through charge to London was not less than the charge for the local or intermediate journey. The case was dismissed because prejudice to the latter class of passengers was not shown, and for the further reason that the higher rate charged was not in itself unreasonable. In that case the difference in destination made out the difference in circumstances which the special act required should be "the same." To charge less per mile for greater distances is a common rule of transportation and its legality is well settled. The case in which the foregoing was cited related to charging a party of ten or more persons less *per capita* than was charged to single passengers, the journeys of the party and of the single passenger being between the same points, and in the same train; it was brought under a provision of our law which merely specified that the circumstances and conditions should be substantially similar, and not the same,



and its phraseology is entirely different from that of the English Equality Clause of 1845. The fact that charges are not unreasonable *per se*, does not prevent their being relatively unreasonable, or constituting unjust discrimination under our second section by reason of being unequal. If the circumstances and conditions are substantially similar for like service, the discrimination is declared in the law to be unjust, but the English Statute required the circumstances to be the same.

The case of *Hozier v. Caledonian R. Co.*, 1 Nev. & McN. 30, was also cited in the same case as showing that the parties must be shown to be competitors.<sup>1</sup> All these cases were tried with reference to undue preference or prejudice, which had to be shown to exist before the defendants could be held guilty of unlawful action. But in the case they were cited to influence no showing was called for. Can it be said that the cases thus cited might not have been differently decided if tried under a provision of law like our second section, which not only forbids but defines the thing forbidden? The English statutes do not show any such definitive rule as is contained in the second and fourth sections of the Act to Regulate Commerce. Section 90 of the 1845 statute, in its proviso required equality when the carriage is over the same portion of the line under the same circumstances. Section 2 of our Act only requires the traffic to be like, the service to be like and contemporaneous, and the transportation under substantially similar circumstances and conditions. The provisions are so different in terms that the same set of facts might constitute immunity under the English provision and guilt under our law. Indeed, the Supreme Court of the United States tersely says of the English acts: "These traffic acts do not appear to be as comprehensive as our own and may justify contracts which, with us, would be obnoxious to the long and short haul clause of the Act, or would be open to the charge of unjust discrimination."<sup>2</sup>

<sup>1</sup> So, also, in like manner were *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45; *Painter v. London, B. & S. C. R. Co.* 2 C. B. N. S. 702, and *Infracombe T. C. Co. v. London S. W. R. Co.* W. N. 289, referred to.

<sup>2</sup> *Interstate Commerce Com. v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92. Take the case of *Hozier v. Caledonian R. Co.* 1 Nev. & McN. 30.

This was a long and short haul case. The decision was under the undue preference clause and to the effect that there must be competition of interest, or the complainant must show personal disadvantage, before he has title to complain, the fact that the complainant had frequent occasion to travel not being sufficient. Would this decision be possible under our fourth section?

The case of *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45, is another passenger case where more was charged from one station than from another station situate a further distance on the same line. The rule was refused because undue preference was not shown. The mere suggestion of undue preference was held to be insufficient. Under the fourth section of the Act to Regulate Commerce, proof of the greater charge for the shorter distance would have been sufficient, for there was nothing whatever in the case upon which the defendant could base justification under our long and short haul clause. In a brief for defendants in the cases of the Georgia Railroad Commission<sup>1</sup> this case of *Jones v. Eastern Counties R. Co.* is cited to show that through and local traffic constitutes such difference that the greater charge does not unduly prejudice the shorter distance points, and also that when active competition exists at the longer distance point it affords a good reason for making the lower charge. If our long and short haul clause did not exist and the case were brought under the undue preference provision the through and local traffic defense might possibly have some weight, but in the face of the mandate contained in the fourth section the claim of justification on the ground that one traffic is local and the other through is absurd. To allow such claim would be to defeat the object of the section. The rate on through traffic to the longer distance point may be proportionately less than the rate on local traffic to the intermediate point, but under the fourth section it cannot be less in the aggregate. As to competition, the position of the commission is well defined. Some competition does afford justification and some does not. But the Jones case had in it no element of competition. Whatever was said there in relation to through and local traffic and competition was spoken by the judges at the trial. The decision was that the mere suggestion of pref-

<sup>1</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 154.

erence because of the greater charge for the shorter distance was insufficient. The same brief cites *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245, decided in 1864. A proviso in a canal act was similar to the proviso in section 90 of the 1845 statute. It was held competent for the company to carry at a lower rate for a particular individual in consideration of a large guaranteed minimum toll in order to enable them (the company) to enter into competition with a rival line of railway. It seems that other English decisions in similar cases have a different conclusion, but whether this is true or not it is too manifest for discussion that our second section would forbid the ruling here,<sup>1</sup> and moreover, that such a contract would in this country be held in contravention of the common law.<sup>2</sup>

In a case lately decided by the English Commission<sup>3</sup> the conflict of English decisions was commented upon as follows: "The question had several times been mooted whether a rate so low as, when compared with another, to amount *prima facie* to an undue preference, could be justified on the ground that it was rendered necessary by the existence of competitive modes of carriage, whether by land or water. The state of the authorities upon the matter was far from satisfactory.<sup>4</sup> The manner in which the question how far the necessities of competition will justify preferential charges was touched upon in *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639, throws no additional light upon the subject. Budd's case, is open to the further observation (for which I am indebted to Sir F. Peel) that it is in conflict with the subsequent Scotch case of *Murray v. Glasgow & S. W. R. Co.* 4 Ry. & Canal Traffic Cas. 456, in the court of session, and the case of *Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.* 14 Q. B. Div. 209, 11 App. Cas. 97, 26 Am. & Eng. R. Cas. 93, in the

<sup>1</sup> *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>2</sup> *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309.

<sup>3</sup> *Liverpool Corn Trade Asso. v. London & N. W. R. Co.* [1891] 1 Q. B. 120, 45 Am. & Eng. R. Cas. 216.

<sup>4</sup> The dicta in *Harris v. Cockermouth R. Co.* 3 C. B. N. S. 693, 713, *per* Cockburn, L. C. J., and in *Ransome v. Eastern Counties R. Co.* 4 C. B. N. S. 135, 177, *per* Crowder, J., are I think, very difficult to reconcile with the decision in *Budd v. London & N. W. R. Co.* 36 L. T. N. S. 802.

English court of appeals, where it was laid down that an action will not lie to recover overcharges made in violation of the provisions of the Act of 1854, against undue preferences. When the Denaby Main case was in the House of Lords the question was not decided, and the state of the authorities has been discussed by Cave, J., in his judgment in *Lancashire & Y. R. Co. v. Greenwood*, 21 Q. B. Div. 215, 35 Am. & Eng. R. Cas. 537."

In a still more recent cases decided in the English Court of Appeal, the above mentioned case of *Harris v. Cockermouth, Manchester, S. & L. R. Co. v. Denaby Main Colliery Co.* and *Ransome v. Eastern Counties R. Co.* and also *Evershed v. London & N. W. R. Co.* L. R. 3 App. Cas. 1029, were discussed; and the case of Budd was held to be no longer law. The ruling on the main question presented by the appeal was that the railway commissioners or the court may take into consideration the existence of a competing route between the same points, in considering a case of alleged undue preference.<sup>1</sup> In that opinion Lord Herschell said of the Equality and Undue Preference clauses: "Where there is a breach of the equality clause, no doubt you may sue to recover the difference, on the basis that you can compel the railway company to pay you back anything which you have paid over what, for precisely the same service, they have charged to another. But under the Railway & Canal Traffic Act, as was pointed out in the House of Lords, the company have their option. They may put up one charge, they may put down the other. It is not an equality clause; it is only a clause relating to undue preference or advantage." "The words of the equality clause have no elasticity at all; there are no outside circumstances to be taken into consideration, and it is not a question of regarding the position of the one trader as compared with the other, and then saying whether there is any undue preference. It is an absolute rigid equality which is demanded by the statute." These words of the learned English judge clearly illustrate what has been said in relation to our own second and fourth sections as compared with the undue preference section which was copied

<sup>1</sup> *Phipps v. London & N. W. R. Co.* [1892] 2 Q. B. 229.

from the English statute into our law. In a case purely of alleged undue preference or prejudice the English cases have direct application. Even in cases under our second and fourth sections, English cases brought under the undue preference clause in which the decision has held undue preference to exist, have value as showing how strictly the English commission or court has applied the broad language of the clause to a particular set of facts, but when English decisions under the undue preference clause are cited by a carrier in justification of its action under the strict language of our second and fourth sections, the citations have greatly diminished force. These sections apply only against rates in specific cases, but the undue preference clause or third section is inclusive; it applies both to rates and facilities, and says generally to the carrier, you shall not in any manner unduly prefer one person or kind of traffic over another, and leaves it to the commission or the court to say when the undue preference is given. In the second and fourth sections what is unlawful is clearly defined, the circumstances and conditions of the transportation being similar in substance. Therefore, while English cases are valuable as defining undue preference or prejudice their value is greatly limited in cases where the statute itself describes the offense it declares unlawful.<sup>1</sup>

#### § 114. *What Circumstances and Conditions Influence Rates for Long or Short Haul.*

In regard to such elements of transportation as through and local traffic, and cost of service, it was held by the commission in *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278: "The commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor, that the traffic which is subjected to such greater charge is way or

<sup>1</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 129.

local traffic, and that which is given the more favorable rates is not." "Nor is it sufficient justification for such greater charge that the short haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof."

Disproportionate expenses of carriage and great variation in the volume of traffic to various points are ever present in railroad service, were within the knowledge of Congress when the section was framed, and must of necessity have been considered as not constituting substantially dissimilar circumstances and conditions, in other than extraordinary cases, for under the contrary view it is manifest that in a large majority of cases the design of the section would be defeated. A defense of the higher rate for the shorter haul, which is based upon cost, must amount to a practical demonstration that the short haul traffic is exceptionally expensive, or the cost of the long haul transportation exceptionally low. What are the circumstances and conditions which a carrier may in the first instance take into account in fixing rates for longer and shorter distances over its line? Under necessary and well settled rules of railroad transportation essentially different circumstances and conditions constantly arise. The section says, "The transportation of a like kind of property under substantially similar circumstances and conditions." A barrel of flour is a like kind of property with a carload of flour, but they are different units of quantity, and the transportation of a carload is not under substantially similar circumstances and conditions with those which apply to the shipment of a barrel, or, under present rules of transportation, any number of barrels less than a carload. Other examples would be one horse and a carload of horses, furniture knocked down or set up, small lots of grain in sacks or loose in carloads, and so on through the great variety of articles of commerce which seek carriage in different quantities and forms. It is proper also to recognize the right of a carrier to charge different but duly published rates according as its liability is diminished by proper conditions stated upon the bill of lading accepted by the shipper, or upon the ticket accepted by the pas-

senger, whereby the carrier, under such special contract, secures to itself some lawful pecuniary or economic advantage. These, and other transportation methods not necessary or possible to specify, constitute many kinds of essentially dissimilar circumstances and conditions arising upon its own line, by which a carrier may rightfully be governed. Circumstances and conditions affecting transportation also arise through competition with other carriers for business; that is, circumstances and conditions which do not wholly arise upon the carrier's own line.

The necessity for a construction of the fourth section of the Act became apparent almost immediately after the organization of the commission. A large number of applications for relief were then filed by roads operating in all sections of the country. Investigations were held in many places, and on June 7, 1887, the applications were disposed of in the opinion above quoted from,<sup>1</sup> and it was evidently intended that the construction there laid down should be sufficient for all cases based on similar grounds which might thereafter arise under the fourth section; but the construction put upon the statute at that time seems to have been misapprehended in some essential particulars by carriers. The commission held in that case that the phrase "under substantially similar circumstances and conditions" in the fourth section is used in the same sense as in the second section; and under the qualified form of prohibition in the fourth section, carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances and conditions that forbid or permit a greater charge for the shorter distance. The commission said in regard to the employment of the same qualifying phrase in both sections 2 and 4: "It will be observed that the phrase is precisely the same; and there can be no doubt that the words were carefully chosen, probably because they were believed to express more accurately and precisely than would any others, the exact thought which was in the legislative mind. And in this section (2) as well as in section 4, the phrase is employed to mark the limit of the carrier's privilege; its privilege, too, in respect to the very subject-matter with

<sup>1</sup> *Re Petitions of the Louisville & Nashville R. Co.* 1 Inters. Com. Rep. 278.

which section 4, where it is employed, has to do, namely, the charges for transportation service." In all cases under the second section the actual facts are of necessity entirely within the carrier's knowledge. The qualifying phrase, "under substantially similar circumstances and conditions," used in the same sense in the second and fourth sections, has no greater force or different meaning in the one than in the other.

In reviewing what was held in the Louisville & Nashville case the precise wording of the statute must not be overlooked. The first part of the section forbids carriers to charge more for the shorter than for the longer haul, when the transportation is under substantially similar circumstances and conditions. The other portion of the section, that which relates to a relieving order by the commission, permits such an order only for the purpose of a lesser charge for the longer haul, but the discretion of the commission is not limited, except that the case must be special—must present a question requiring authoritative action. The commission said in that case that if the section had passed as it once stood, without containing the qualifying phrase "under substantially similar circumstances and conditions," the commission might have exercised its discretion in all cases where the circumstances and conditions appear to be different, and it would have entered upon its duties "with a distinct understanding of the task imposed, even though its adequate performance might have been out of the question, but modified as it now stands, the necessity for a relieving order is greatly narrowed, it being obvious that no order is needed to relieve against the operation of the statute, when nothing is done or proposed which it makes unlawful."

But the commission clearly foresaw at that time that a construction of the statute which would deliver even questions purely of fact unto the carrier's judgment in the first instance, must be accompanied by a statement of principles on which such judgment must be based or the greatest confusion and litigation would follow, and thereupon proceeded to lay down for the guidance of carriers, rules which would not warrant them in making charges greater for shorter distances, than those established for longer hauls.



The rules limiting the judgment of the carrier in respect to greater charges for shorter hauls were briefly stated as follows :

“ Sixth : The commission further decides that when a greater charge in the aggregate is made for the transportation of passengers or the like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance, it is not sufficient justification therefor that the traffic which is subjected to such greater charge is way or local traffic, and that which is given the more favorable rates is not. Nor is it sufficient justification for such greater charge that the short haul traffic is more expensive to the carrier, unless when the circumstances are such as to make it exceptionally expensive, or the long haul traffic exceptionally inexpensive, the difference being extraordinary and susceptible of definite proof. Nor that the lesser charge on the longer haul has for its motive the encouragement of manufacturers or some other branch of industry. Nor that it is designed to build up business or trade centers. Nor that the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up. The fact that long haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic.”<sup>1</sup>

The commission might have stopped there and directed the carriers to withdraw their applications, leaving further construction of the section to come up in cases of complaint or subsequent application for relief. But before laying down any principles, except the construction as to the carrier's right of primary determination, it said : “ It is manifestly important to the public interest, as well as to that of the railroads themselves, that mistakes shall as far as possible be avoided. It is also important that the general rule laid down by the statute be strictly complied with whenever compliance appears to be fairly practicable, and that carriers direct their attention more to the feasibility of coming into conformity with it, than to the possibility of finding reasons upon which to ground exceptions. They are therefore enti-

<sup>1</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.

tled to the benefit of such conclusions as we have already reached upon the general merits of their applications that they may be guided thereby in the preparation of their tariffs respectively. In giving these conclusions we limit ourselves strictly to the cases presented and leave out of view such other grounds of relief, if any, as are not yet formally brought forward." The commission then proceeded to discuss and lay down the rules above set forth. It being apparent that competition of various kinds would constitute a main subject for consideration in cases of long and short hauls, the commission discussed the force and effect of the competition of carriers not subject to the law, and also that of carriers subject to its provisions, for the purpose of arriving at such general conclusions in regard thereto as would properly direct carriers in establishing rates for longer and shorter hauls. The commission said generally on the subject of competition as creating dissimilarity in circumstances and conditions, that Congress in rejecting the fourth section as introduced in both of its branches, and insisted upon in the bill passed by the House, "understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and among others in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was beyond doubt especially in view." But the commission immediately said in that connection that Congress must be supposed to have allowed this because the public interest required it, and "that only legitimate open and fair competition was meant, not everything that has been done under the name of competition, and which in many cases has been equally destructive of public and private right. Among common abuses, have been the granting of special favor in exceptional rates, rebates, drawbacks, etc., all of which are now expressly prohibited by law when they assume the form of unjust discrimination. There has also been favoritism between places and communities, as a result of competition; but this is no longer permissible." It was also expressly stated in the opinion that the

prohibitions against unjust and unreasonable rates, and unjust discriminations, apply as well to cases under section 4 as in other cases. In taking this view of the meaning of the statute the commission undoubtedly relieved itself of many onerous duties in the consideration of cases arising on applications for orders granting leave to charge less for the longer distance on the score of competition; and the difficulty of discharging these duties was clearly set forth in the beginning of the opinion. By defining the kinds of competition which might entitle the carrier to make less charges for the longer distances, and thereby justify consequent greater charges on its line for shorter hauls, the commission has recognized that competition of that character constitutes a state of facts of which the carriers could judge in the first instance, without giving color of right to any charges on the competing line.<sup>1</sup>

§ 115. *Competition with Water Carrier; with Foreign Railroads; with Non-Interstate Railroads; in "Rare and Peculiar Cases."*

Now what kind of competition did the commission hold might, by warranting a lesser long haul charge, justify carriers in establishing greater charges for shorter hauls? The answer is: Competition with water carriers. Competition with foreign railroads. Competition with railroad lines wholly in a single state. Such carriers are not subject to the law. They are independent of all regulation by the Federal authority, and consequently the carrier, subject to such regulation, in first determining for itself to charge less for the longer distance because of such competition, does not by meeting the competitive rates give color of right to rates on the other competing lines, for the law does not regulate such rates. The commission described one other kind of competition which might entitle a carrier to charge less for a longer haul and thereby justify short haul charges. This was in "rare and peculiar" cases of competition with a railroad subject to the Act,

<sup>1</sup> *Trammell v. Clgde SS. Co.* 4 Inters. Com. Rep. 120.

where a strict application of the general rule of the statute would be destructive of legitimate competition. This class of cases was illustrated by two instances of very circuitous routes; one being where the competing lines run from the point of shipment, one in a direct line to the longer distance point while the other runs in the opposite direction and its traffic reaches the longer distance point by taking a wide circuit. This was the Pittsburg or Youngstown case. The other illustration was that of roads running north and south delivering to connections at terminals or intermediate junctions, and competing to and from a common market with direct east and west roads, which by reason of greatly less distance make the rates to the longer distance point. The belief was indulged in by the commission, that the carriers by strictly observing the limitations put upon their judgment in that opinion, and at the same time obeying the other provisions of the statute, would find little necessity for applying to the commission for relief; that the operation of the law upon two carriers subject to its provisions would render competition between them an infrequent cause for seeking aid in an order relaxing the rule. But from the outset the commission realized that the provision for relief in the fourth section would promote the interests of interstate commerce and uphold the rights of carriers, by preserving competition between carriers subject to the Act which the commission should ascertain to be legitimate. The opening part of the opinion under consideration states the view of construction which was thereafter discussed and approved: That "the order for relief would be needful only when the case was not one of plainly dissimilar circumstances and conditions, but in which, nevertheless, there might be reasons and equities that would sanction such greater charge." Further on the commission said: "The later clause in the same section which empowers the commission to make orders for relief in its discretion, does not, in doing so, restrict it to a finding of circumstances and conditions strictly dissimilar, but seems intended to give a discretionary authority for cases that could not well be indicated in advance by general designation, while the cases which upon their facts should be acted upon (by the carriers) as clearly exceptional, would be left for

adjudication when the action of the carrier was challenged. The statute becomes on this construction practical and this section may be enforced without serious embarrassment."

It would be impossible to "indicate in advance by general designation" all cases of competition between carriers subject to the Act, that should, or should not come under the general rule. Competition between carriers subject to the Act does not constitute plainly dissimilar circumstances and conditions, and the duty of primarily determining the question is laid upon the commission by the fourth section of the statute. The necessity for supplemental construction arises from the fact that carriers in the operation of their lines have not held strictly to the principles laid down in the Louisville & Nashville opinion, under a possible misapprehension of the scope of that decision. In stating in that opinion what kinds of competition might entitle the carrier to make lesser long haul charges, or that create dissimilar circumstances and conditions under which it would be justified in charging more for shorter hauls, it is said in a late case.'—"In the light of more than five years operation of the statute, the Commission now conclude it should not have included in such statement, 'rare and peculiar cases of competition between railroads subject to the Act, where a strict application of the general rule of the statute would be destructive of legitimate competition, if this language in the opinion was fairly susceptible of the interpretation which the carriers have put upon it. As an exception it was not consistent with the otherwise harmonious theory on which the whole opinion was based. It constituted an exception to the clear reservation for the primary action of the Commission in cases involving competition between carriers subject to the Act, which is implied in the fourth section. Because the instances of such 'rare and peculiar' cases cited in the opinion, are such as indicate a hardship that the commission would not fail to recognize and by an order under the provisory clause relieve, if applied for, was no good ground for permitting the carriers to determine for themselves what cases of such competition are rare and peculiar, or when any cases of strife for traffic between carriers sub-

<sup>1</sup> *Trammell v. Clyde SS. R Co.* 4 Inters. Com. Rep. 120.

ject to the law will, if the strict rule of the fourth section is applied, be 'destructive of legitimate competition.' From the fact that many carriers have, as was natural, expanded the permission restricted to 'rare and peculiar cases' into a privilege to presume that whenever they engage in competition with other carriers subject to the Act the case becomes 'rare and peculiar,' the exceptional ruling has become inoperative, delusive, and opened the door to many evasions of the statute. There is nothing in the statute which warranted the exception."

The prohibitory part of the fourth section of the statute is followed by this proviso: "That upon application to the commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for transportation of passengers or property; and the commission may from time to time prescribe the extent to which said designated common carrier may be relieved from the operation of this section of this Act." Force must be given to this part of the section as well as the other. In the framing of the fourth section it appears that a proviso of this character was made a part of it before the words "under substantially similar circumstances and conditions," were inserted in the preceding general rule. The debate indicates that the then object of the proviso was to give the commission substantially discretionary power to relieve carriers from the operation of the general rule. The subsequent incorporation of the clause, "substantially similar circumstances and conditions" in the prohibitory part of the section, the same phrase being already in the second section, could only have been intended to provide for a class of cases where the carrier is capable of determining for itself whether the transportation conditions are similar, and this it can easily do when the competition is with carriers not subject to regulation under the Act. If it had been intended by that phrase to cover all cases of dissimilar circumstances and conditions apparent and actual, regardless of whether fairness and justice to carriers, shippers and localities demanded the exceptional charge, then the proviso would have been stricken out when the similarity clause was in-

sented. But the debates indicate that both the proviso and the clause were regarded as necessary, and that the proviso would apply to a class of cases not intended to be covered by the similarity clause. In the absence of anything in the phraseology of the statute which clearly indicates to what class of cases these two provisions respectively apply, it becomes necessary to seek for an interpretation that is reasonable and will give effect to both clauses. A statute must, if possible, be so construed as to give effect to all its provisions. The competition of carriers subject to the Act with carriers not amenable to its provisions plainly constitutes dissimilar circumstances and conditions which justify a reasonable departure from the rule of the fourth section if the competition be actual and controlling in respect to traffic important in amount. This includes the competition of independent water lines, independent state railroads, and foreign railroads, where they have not so connected themselves with the carriage of interstate traffic as to thereby become subject to the Act.

Of the similarity or dissimilarity in the circumstances and conditions which originate in real and tangible competition with lines not subject to the Federal authority, the carrier is obviously well qualified to judge and determine for itself in the first instance. Such circumstances and conditions have direct bearing upon traffic over the line, and are not subject to qualification by a multitude of other facts pertaining to lines of other carriers subject to Federal regulation. For instance, the competition between rail carriers both subject to the Federal law for business between two points does not, *because it exists*, constitute circumstances and conditions of transportation which one carrier is competent to say will warrant exceptional rates on its road, even though the other may have been the shorter line. Such a case presents questions that can only be properly determined by the regulating authority created by the law. Rates on the competing line may or may not be lawfully adjusted, and the low rates to the competitive point may be remunerative on the shorter line but unreasonably low and unprofitable over the longer line. This is a case for investigation by the commission, not only with reference to the long line but it also involves a scrutiny of the rates of the com-

peting road and the reasons which cause the low rates to be charged. Another consideration is that the carriers if left to themselves are likely to force the already low rate lower and lower, whether it originally paid both carriers or not, until finally a point is reached where other traffic on both lines is burdened with part of the cost which properly belongs to the business competed for; charges to many points on both lines are thrown out of just relation, and what is still worse, the competition which has become illegitimate is likely to have so affected rates of roads not interested in the original strife, but which have felt obliged to give relatively lower rates to competitive points on their lines in the same territory, that they too stand in unlawful light. Competition unrestrained will naturally develop into reckless warfare, or through that combination which is the logical result of destructive or ruinous competition, perpetuate a system of rates which is burdensome to many communities while it unduly favors a few, and yet brings no additional returns to the carriers concerned. The law-making power never intended that competition should have such unrestrained and disastrous sway, before the remedy of regulation should be invoked and applied.

But competition between carriers, subject to the Act to Regulate Commerce, *may* furnish grounds for disproportionate rates on the line of one of the carriers, and when such railroad company meets a stronger competitor in the strife for business between the same points, such a case should, if the weaker line will gain some profit from the competitive rate, be brought to the attention of the commission as a *special case* for relief under the proviso of the fourth section. The commission will investigate the matter, and having in view the rights of both carriers and their duties to the persons and communities they serve, equitably determine the questions involved.

The regulation provided by the Act to Regulate Commerce is not intended to limit or restrict, but rather to preserve and encourage legitimate competition between carriers subject to its jurisdiction; but the legality of such competition should in no case be arbitrarily determined by the competitors themselves. Those who are subject to the law can never find excuse for diso-



bedience in the disobedience of another, and neither should be allowed to judge of what constitutes obedience on the part of another. Competition between carriers subject to the Act, to be legitimate, must be based upon actual compliance with the provisions of that law. When the competing carrier is not subject to the Act, that fact alone may constitute a substantial dissimilarity in circumstances and conditions, because the rates of the competing carrier are not subject to regulation under the statute, so that there is no room for presumption or doubt in such a case. In such a case it is easy to see that it was wise for Congress to allow the carrier to act independently of the regulating body in deviating from the general rule, but in a case where both carriers are subject to the statute, there can be no presumption of the existence of facts that would warrant a departure from that rule, and the question whether they do exist or not, must necessarily be a mixed question of fact and law depending on various considerations, as hereinbefore shown, which the regulating body must pass upon; and complicated as such a question is it would be contrary to all analogy to allow one of the parties in interest to determine for itself. It would be a novelty in the drafting of statutes to charge a person who is made subject to the law, with the solution of such difficult and intricate problems as must arise under the fourth section of this statute, on the claim of a right arising from competition with another carrier also subject to that law, to disregard its general provision, and which Congress foresaw could only receive just solution by wholly disinterested minds. The protection of the law extends equally to carriers and the public, and no other interpretation of its provisions than that which awards even handed justice to both is admissible. The line between the right of a carrier to conclude for itself in the first instance, and the necessity of applying to the commission for relief, is sharply drawn at the point where the carrier is manifestly unable to rightfully decide.

In no case is there any presumption of dissimilarity of circumstances and conditions where the competing lines are both subject to the Act, and there being no such presumption, neither road can deviate from the general rule on its own motion, but must

apply for relief under the proviso clause of the section, and the burden will rest upon the road seeking such relief. Under that proviso there seems to be no limitation upon the power of the commission to grant relief when, upon consideration of all the facts the commission is satisfied "that the interests of the commerce of the country and common fairness to the common carriers require that an exception should be made." It is difficult to see why this proviso is not broad enough to enable the commission to relieve all cases of hardship under the fourth section arising from competition between carriers subject to the Act, including many of the embarrassments now felt by the American carriers, in competition with Canadian carriers, which may be subject to the Act in respect to the traffic competed for.

The foregoing has been especially directed to the competition of carriers subject to the Act between the same points. The same course should be taken when carriers meet the competition of other lines which carry traffic to the same point, but from different points of origin. The strife for trade between different markets seeking transportation for like commodities to the same locality, is undoubtedly one of the most potent commercial forces of our time. But a common carrier cannot rightfully assume that this or that market upon its line is entitled as a matter of right, in shipments to a given point, to rates which another carrier sees fit to give from a market on its line to the same point. It does not follow that markets competing for trade in the same territory must enjoy similar rates in order to compete with each other; and the carrier which serves one market has no right to assume that substantially equal rates must be given. Market competition does not create circumstances and conditions, which the carriers can take into account in determining for themselves in the first instance, whether they are justified under the 4th section in charging more for a shorter than for a longer distance over their lines. To determine the force and effect of such competition involves commercial considerations peculiar to the business of shippers, such as advantage of business location, comparative economy of production, comparative quality and market value of commodities, all of which are entirely disconnected from circum-

stances and conditions under which transportation by the carrier is conducted. Carriers cannot create abnormal situations by making rates which equalize advantages and disadvantages of competing localities, and thereupon claim justification for greater charges on shorter hauls, on the ground that the lesser long haul charges which accomplish such equalization are necessary to secure increase in traffic over their lines. Under the 4th section, where doubt arises as to the existence of facts which would legitimately force a lower rate for the longer haul, and we think doubt must always exist where the competing carriers run from different markets, the carrier cannot assume to solve it. The propriety of applying to the commission for relief in such a case is apparent.

To repeat the idea above discussed, the competition of carriers subject to the law between the points mutually served, or competition between different markets to the point where competing lines join, does not, merely because it exists, make out the dissimilar circumstances and conditions upon which a carrier may on its own motion base a lower rate for one point, while it keeps in effect a higher rate for a shorter distance over its line. They are not presumptively dissimilar. Investigation by the commission may, with no wrong to the carrier, but with permanent benefit to the places they serve, result in bringing charges to all points in the immediate territory into closer conformity with the law, and render a lower rate for the longer distance unnecessary, or else furnish sound reasons for its being sanctioned. Regulation having been provided by Congress, its application is not only constant, but the machinery of the law is at all times available by the carriers governed, as well as by the public which the carriers serve.

The special cases referred to in the proviso of the fourth section, in which the commission is empowered to make investigation and grant relief from the requirements of the general rule, include all cases that primarily involve questions of regulation over the respective competing lines. The line which forces the lower rate may itself be guilty of disproportionate rates. Such disparity may not be so great as to have caused a complaint to the commission by the patrons of the line, notwithstanding the bur-

dens imposed may be manifest, but when rates so adjusted are made the basis of another line's departure from the rule of equitable charges, the situation imperatively calls for the intervention of the regulating authority, both in the interests of the connecting roads and of their patrons. A construction of the law which allows a carrier to determine for itself in every instance whether the lower rate for the longer distance is warranted, is liable, when such lower rate is adopted by it, to cause another carrier serving the same territory to feel justified in establishing a lower rate for the longer distance on its line to the same point, or to a different point appearing to require relatively favorable rates; and is also liable to cause other carriers in the same section to take similar action; thus creating an artificial or abnormal situation, which constantly provokes belief and claim of unjust discrimination and endless controversies between shippers and carriers. Such a situation, left unchanged, presents a railroad problem most difficult of solution. But a construction of the law which will compel a carrier, before putting in a lower rate for the longer distance, to seek relief by a method which will involve a careful examination of the traffic conditions as to all the lines competing for carriage in the same territory, would tend to promote a solution more beneficial for all parties. A concise statement of this construction of the fourth section on the point above discussed is: The carrier has a right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section, in all cases where the circumstances and conditions arise wholly upon its own line, or through competition for the same traffic with carriers not subject to regulation under the Act to Regulate Commerce. In other cases, under the fourth section, the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance, except upon the order of the commission.

Soon after the Louisville & Nashville opinion was promulgated by the commission, Judge Pardee of the United States circuit court approved this construction in *Missouri Pac. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 527. Upon ex parte application of the receivers of the defendant for advice in relation to the

construction of the fourth section of the Act to Regulate Commerce, the court held: Under section 4 of the Interstate Commerce Law, relating to the charges for the long and short haul, it seems that where the circumstances and conditions are dissimilar there is no prohibition; where the circumstances and conditions are similar the prohibition attaches; and that where it is difficult to point out clearly the circumstances or conditions which produce dissimilarity, the doubt should go in favor of the object of the law, and the circumstances and conditions should be taken as substantially similar. Where the circumstances and conditions are similar, or substantially similar, and the result to the carrier is injurious, relief can be had only through the commission. Neither is this view in serious conflict with the opinion expressed by Judge Deady in *Ex parte Koehler*, 1 Inters. Com. Rep. 317. The *Ex parte Koehler* cases all involved water lines, and the rulings were made with especial reference to the influence of competition by that mode of carriage; and the language of the judge in the course of discussion must be construed with like reference.

The case of the *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Fed. Rep. 295, was brought to enforce an order of the commission issued against the defendants in a proceeding brought before it by the San Bernardino Board of Trade. In this case the defendants took a great deal of additional evidence upon the subject of water transportation at the longer distance point. The court discussed the evidence at considerable length and held that such means of transportation actually existed, was actually and actively seeking the traffic, and that shipments by water were increasing. The decision turned upon this showing, and the language of the court in the course of the discussion must be held to have been made with reference to the facts therein set forth. The principle stated by the court that to render lawful a greater charge for a shorter than for a longer haul, under section four of the Act, it is not necessary to first obtain authority of the commission; that such charge is lawful if the circumstances and conditions are not in fact substantially similar and the carrier may determine for himself, subject to a liability for violating the Act, if, on investigation, the fact be

found against him, is clearly in line with this view as to competition by water lines, or the competition of foreign railroads, or the competition of independent state railroads. The decision was not rendered upon any controlling considerations of competition between carriers subject to the law. In the case of *Osborne v. Chicago & N. W. R. Co.*, 48 Fed. Rep. 49, Judge Shiras in charging the jury, said: "Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, is a question that cannot be submitted to you. Questions of that kind are for the judgment and determination of the board of commissioners appointed under this Act, and the courts and juries, when they are called to act upon particular cases arising under this Act, where it is denied that the law has been violated, are only authorized to determine the question whether in the service rendered, the character of the property, its conveyance, and other facts which inhere in the carrying of freight upon the particular line which is charged with wrong doing, there existed dissimilar circumstances and conditions relieving this company from the charge of collecting a larger rate for the shorter haul over the same line, in the same direction, and under otherwise substantially similar circumstances and conditions."

This decision distinctly follows the construction that where doubt exists, the circumstances and conditions should be taken as substantially similar. Doubt always exists as to the legitimate force of the competition between carriers, subject to the law, which one of them claims to compel the making of exceptional charges over its line. The law restrains both alike and the true presumption is that they have equal advantage under the law. But if hardship is encountered then relief, temporary and continuing, may on proper showing be obtained under the proviso of the fourth section. In a case where the competition of a state railroad which in no way made it subject to the Act, was alleged to justify the lower rate, the Interstate Commerce Commission sus-

tained the defendant, and laid down the following principle: "The words 'substantially similar circumstances and conditions' as found in the second and fourth sections of the Act to Regulate Commerce, in certain important particulars define the rights and duties of carriers, and the rights of shippers as well. For example, if the carrier claims to act under the compulsion of circumstances and conditions of his own creation or connivance in the making of an exceptional rate, then these will not avail him; or if the carrier claims to act under a compulsion of circumstances and conditions in the making of an exceptional rate which he could obviate by reasonably fair and just exertion on his part, then they will not avail him. But if the carrier is in good faith acting under a compulsion of circumstances and conditions beyond his control, not of his connivance, and which he could not obviate by any reasonably fair and just effort on his part, and to avoid large loss adopts exceptional rates on a portion of his line, not unreasonable in themselves, and forced upon him by the action of an independent state railroad, which is not subject to the Act to Regulate Commerce, and which is operating a slightly shorter and competing line with his own, these are circumstances and conditions under the operation of the statute which justify him in adopting such exceptional rates thus forced upon him on this portion of his line." This rule excludes the competition of carriers subject to the Act from the carrier's judgment. The distinction herein made between the competition of carriers subject to the Act, and the competition of such a carrier with those not subject to the Act, is also applicable to competition alleged in cases under the second and third sections, and the commission so considered in *Harwell v. Columbus & W. R. Co.* 1 Inters. Com. Rep. 631.

In a case where railroad competition was alleged by the respondent to justify the exceptionally lower rate, which came before the commission for investigation in July, 1888, it appeared that the lower rate was caused by what the respondent termed unfair competition by the competing line, and the evidence tended

<sup>1</sup> *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

strongly to show that the long haul rate was unreasonably low.<sup>1</sup> In its annual report to Congress for that year the commission said of its decision in that case: "The reasoning seemed strong and was certainly plausible. But the question involved was a question of the construction of the Act; its answer was to be arrived at on consideration of what was probably the legislative intent. It was seen that the circumstances and conditions relied upon as entitling the carrier to make the exceptional rates were not circumstances growing out of natural causes; they were not the outcome of competition by water routes; there was no peculiarity of the line which would make the rates at the termini and at other stations relatively just; the only dissimilarity in the circumstances and conditions which attended the making of the rates at the different points was that at the termini there was sharp railroad competition and at the intermediate stations there was not. But this was a state of things that, at the pleasure of the railroad companies acting generally, or even of single companies disposed to act in hostility, might be made to exist at any point of railroad connection in the country; and if the greater charge on the shorter haul was admissible in the case under investigation, the rule of the fourth section would be of no practical value whatever. Any railroad company might by its action absolve a competitor from its obligation, and be itself absolved in return. The legislature never intended this consequence. It did not intend, the commission believed, that the carriers subject to the law, should at pleasure thus make the rule of the statute ineffectual. The carrier under investigation conformed to this conclusion and graded its rates accordingly, and the objectionable rates made by the carrier complained of were also soon discontinued."

There has been a late English construction of the law of undue preference contained in the Act of 1888, as applied to a case where competition with other railways between the same points and also water transportation was relied upon to justify a lower charge for a longer distance, but the shorter was not included within the longer distance. A clause in the statute relating to the public

<sup>1</sup> *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137.



interest and interests of the railways is carefully construed. As to the public interest, it was held, that the fact that it is seldom not in the interest of the public to have a choice of competing routes, does not decide the question. "It is clear that the Act contemplates the possible existence of competition which may not be in the interests of the public although it be effectual to secure traffic." After considering the words "public interests" the following rules are stated in the English opinion: "It is however, as a general rule, against the public interests that uncertainty should be introduced into trade by frequent or violent or arbitrary changes of the circumstances under which people engaged in business have to carry it on and to make their living. It is, as a broad general rule, against the public interests that artificial circumstances, which at the will or caprice or for the self interest of any man, or body of men, may be swept out of existence as lightly as they were perhaps created, should be permitted to interfere with the natural course of trade."<sup>1</sup> This English case clearly illustrates the construction of the law, that the existence of competition between carriers subject to the Act does not justify them in the first instance in charging a lower rate for the longer distance. That case is not a proper one to cite as a precedent in a long and short haul case under our statute, for the circumstances of carriage are very different. It was purely a case of relative rates of undue preference between markets, but it shows how strictly the English authorities interpret the broad language of their law, in accordance with the evident intent of the law-making power.

A proceeding known as the "Import Rate Case," and instituted by the Interstate Commerce Commission to enforce its order restraining carriers from charging less for services rendered in carrying import traffic from American seaports, when shipped from foreign ports under through bills, than they charge for carrying domestic shipments of like kind of traffic between the same points, was decided in the United States Circuit Court, Southern District of New York, on October 5, 1892. The long and short

<sup>1</sup> *Liverpool Corn Trade Asso. v. London & N. W. R. Co.* L. R. [1891] 1 Q. B. 120, 45 Am. & Eng. R. Cas. 216.

haul question was also to some extent involved. Wallace, J., writing the opinion, which sustains the ruling of the commission, in conclusion said: "The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given, the traffic obtained by giving it would go to a competing carrier. A shipper having a choice between competing carriers, would only have to refuse to send his goods by one of them unless given exceptional rates, to justify that one in making the discrimination in his favor on the ground of the necessity of the situation." See also the decision of the commission in the case of *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682. In that case the defendants sought to justify the greater charge for the shorter haul on the ground of the competition of water carriers in connection with delivering rail lines from a different market. On this point the commission held that "water competition to *justify* the greater charge for the shorter distance, must be competition in transportation to the longer distance point, and as to freight which, if not carried over the line on which it is located, would reach such destination by water transportation." The case was brought by complaint. There was no appearance at the hearing first assigned. The defendants subsequently, upon the ruling of the commission that the burden was upon them, took a little testimony by deposition, and the case was submitted with little or no argument on either side. The ruling and the order to cease and desist from charging more for the shorter than for the longer distance, was in accordance with the spirit of the commission's previous decisions and the only logical outcome of the case. The defendants attempted to justify the greater charge for the shorter distance, on the ground of substantially dissimilar circumstances and conditions, but they were not plainly dissimilar, under the construction of the section as laid down by the commission and approved by the courts. The competition relied upon to constitute the dissimilarity in circumstances and conditions, was not only from a different point of shipment, but it was the competition by carriers over through routes subject to

the Act. What was said in that decision with reference to the competition of markets has been re-affirmed.<sup>1</sup> The competitors stood presumably with equal advantage under the law and the exceptional rate could only be sanctioned by an order granted upon investigation which should sustain the carrier's application for relief.

Where branch lines of a railway company are crossed by the main line of another company, and from these points the company comes in competition with the other company from its main line points, the charges on these branches do not establish a standard of reasonable rates for like distances from points on another branch of the same company, where no such competition exists.<sup>2</sup>

### § 116. *Long and Short Hauls and Group Rates.*

Complaints of the operation of that part of the fourth section of the Act to Regulate Commerce commonly called the long and short haul clause, as appears by the report of the Interstate Commerce Commission, rapidly decreased. The carriers by rail have so far made their rates and charges fairly proportional as between local and long haul traffic that the clause, if it ever worked injustice to them, does so no longer. Indeed, as the general result is to give greater satisfaction to local communities without unjustly affecting the great centers of commerce, the outcome cannot fail to be beneficial to the carriers themselves. Nothing is more desirable to any railroad than that its patrons shall be convinced that its rates are just, and they can never be made to believe this while the extraordinary differences in charge which were formerly made in many cases, as between the long and short haul traffic carried over the same line, are persisted in. Much of the complaint now made of the clause in question, with a view to affecting public sentiment, ignores altogether the fact that the prohibition of the greater charge for the shorter haul, is very much qualified in the statute, and that in respect to freights, it is limited to those of a

<sup>1</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.

<sup>2</sup> *Northwestern Iowa Grain & S. S. Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431.

like kind carried over the same line in the same direction and under similar circumstances and conditions. A stranger to the law might infer, from some public addresses and pamphlets which have assumed to discuss this subject, that the railroad companies were prohibited from carrying the necessities of life over long distances at very low rates, unless their rates on other subjects of transportation for shorter distances were made to correspond. Indeed, instances have been pointed out in which it was said that certain articles of commerce could not now be transported for long distances, because by reason of this provision they would not bear the charges that must under compulsion of law be imposed upon them. Among such instances has been mentioned the granite industry of New England, as to which it has been said that valuable manufactories have ceased to be profitable because it has now become impossible for the proprietors to obtain from the railroad companies the nominal rates for the transportation of their products which they formerly enjoyed, since it is now, by the long and short haul clause, made criminal for the companies to give such rates. A complaint of this nature is baseless in point of fact. The instance mentioned may safely be assumed to be chosen rather from regard to the needs of an attack upon the law, than from any belief in the justice of its application. The prohibition of the fourth section, so far as it concerns this article of commerce, or any other that can be named, will have no application whatever until it is made to appear that elsewhere upon the lines of the roads conveying it, there is property of the same kind for transportation by the same carriers in the same direction, upon which the carriers are disposed to make greater charges in the aggregate for the shorter hauls. The wheat of the extreme west, it is also said, can no longer have the nominal rates which were formerly made for transportation to the seaboard, but this assertion is also without point or applicability, unless it is shown that the carriers are not only disposed to give such rates, but propose to make up for the consequent losses to themselves by the imposition of greater charges in the aggregate for the carriage of the like grain when offered for carriage by growers in the states nearer the seaboard. Nominal rates, im-

partially made as between shippers of like articles, in the same direction, and under like circumstances and conditions, are as admissible now as they ever were.

A law that does not prohibit an equal charge for the transportation of like articles for the longer as for the shorter distance, would seem to be quite as liberal as could be asked for or desired, provided the transportation in each case is under like circumstances and conditions. And such is the law of the clause in question; the same charge may be made for the carriage of the like articles for ten miles, as for a thousand, without a violation of its terms. Even in its prohibition of the greater charge upon the shorter haul it lays down no arbitrary or inflexible rule, but assumes that there may be exceptional cases which can be justified in reason. And it is a matter of common knowledge that there are in different parts of the country many cases in which the greater charge is still imposed for the shorter haul of like property in the same direction, which the carriers defend upon a showing that the circumstances of the cases are so different as to warrant this seeming anomaly and unfairness. Those who complain of the provision in question as an unwarranted invasion of the rights of carriers, appear to overlook the fact that, as enacted in the Law to Regulate Commerce, it is not new. As far back as 1850 it was enacted in Vermont that "a railroad corporation whose roads are located in the state, shall not charge a larger sum for freight, merchandise or passage of passengers thereon, for a less distance to or from a way station on said road, than is charged for a greater distance."

In 1882 it was further provided by statute in the same state that "two or more corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them, a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight, from the same original point of departure, to a station at a greater distance on the road of either of them in the same direction. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges: Provided, That this section shall not be

construed as affecting the right of any railroad company to establish such rate on freights shipped over their line in carload lots from points outside the state to points beyond the state, as may seem for their best interests." The state of Virginia declared, by act of 1867, that "no such company shall charge a greater sum for the transportation of freight over a part of its line than is charged for the transportation of similar freight over the whole length of its line"—a provision which has since been made much more stringent. Ohio, in 1872, enacted that "no person or company owning, controlling or operating a railroad in whole or in part within this state, shall charge or receive for transportation of freight for any distance within this state, a larger sum than is charged by the same company or person for the transportation in the same direction of freight of the same class or kind, for an equal or greater distance over the same railroad and connecting lines of railroad." The legislature of West Virginia in 1872 enacted that "such railroad corporation shall not be permitted to charge for the transportation of freight and passengers, or either, a less sum from one terminus of their road to the other than from any intermediate station to either terminus thereof, nor a greater sum for the transportation of freight and passengers, or either, from any intermediate station to either terminus of the road, or from either terminus to an intermediate station, or from one intermediate station to another, than from any intermediate station to either terminus, or from either terminus to an intermediate station, or from one intermediate station to another, where the distance is less." Here it is seen that the rule laid down is inflexible, not permitting exception.

In the year 1873 the state of New Jersey declared by law that "hereafter it shall not be lawful for any railroad or canal company, doing business in this state, to charge or receive any greater rate of compensation for freight upon goods, wares or merchandise transported between way stations or between a terminal station and a way station, than they charge and receive for freight upon such goods, wares and merchandise between the terminal stations of such railroad or canal." This, it will be perceived, laid down a fixed and inflexible rule that allowed of no

exceptions dependent upon circumstances. The policy of Illinois was declared, by act of 1873, as follows: "If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this state, the same or a greater amount of toll or compensation than is at the time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same railroad: . . . all such discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad corporation as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act; and it shall not be deemed a sufficient excuse or justification of such discriminations on the part of such railroad corporation that the railway station or point at which it shall charge, collect or receive the same or less rates of toll or compensation for the transportation of such passengers or freight, or for the use and transportation of such railroad car, the greater distance than for the shorter distance, is a railway station or point at which there exists competition with any other railroad or means of transportation."

The people of Pennsylvania, when adopting their constitution in 1873, inserted therein the following provision: "Persons and property transported over any railroad, shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class in the same direction, to any more distant station." This again is without qualification, and it is believed that the railroads of that state have found it greatly to their advantage to comply with this provision, and that the people themselves have never been heard to complain of it. The state of Massachusetts, by statute in 1874, declaring that: "No railroad corporation shall charge or receive for the transportation of freight to any station on its road, a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure, to a station at a greater distance on its road, in the same direc-

tion. Two or more railroad corporations whose roads connect, shall not charge or receive for the transportation of freight to any station on the road of either of them, a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on the road of either of them, in the same direction. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges; and the road of a corporation shall include all the road in use by it, whether owned or operated under a contract or lease."

In the constitution of Arkansas, adopted in 1874, the following provision is found: "Persons and property, transported over any railroad, shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant station." In the acts of 1874-75, of North Carolina, it is provided that: "It shall be unlawful for any railroad corporation, operating in this state, to charge for the transportation of any freight of any description over its road, a greater amount as toll or compensation, than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance." The state of New Hampshire, by an act bearing date in 1879, declared that: "No railroad, owned or operated in this state, shall charge a higher tariff on like classes of freight by the carload, when delivered at any station on its line, than is charged to deliver the same at any station on the road, when the transportation is for a greater distance." By another section it was declared that nothing above: "Shall be so construed as to affect the rights of any railroad owned or operated in this state, from establishing such rates on freight shipped over their lines from points outside of the state, to points beyond the state, as may seem for their best interest." And by act of September 14, 1883, it was provided that: "No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the



transportation of the like class and quantity of freight from the same original point of departure, to a station at a greater distance on its road in the same direction. Two or more connecting railroads in this state shall not charge or receive for the transportation of freight to any station on the road of either of them, a greater sum than is at the time charged or received for transportation of the like class and quantity of freight from the same original point of departure, to a station at a greater distance on the road of either of them in the same direction. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges, and the road of a corporation shall include all the road in use by it, whether owned or operated under a contract or lease." The state of Nevada, by an act of 1879, provided that: "it shall be unlawful for any person or persons engaged in the transportation of property . . . to charge or receive any greater compensation per carload, or part thereof, of similar property, per mile, for carrying, receiving, storing, forwarding or handling the same, for a shorter than for a longer distance in one continuous carriage."

The state of California, in the revision of its constitution in 1879, provided that: "persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class in the same direction to any more distant station, port or landing." South Carolina, in 1882, declared it to be unlawful for persons engaged in transportation by railroad: "To charge, collect or receive for the transportation of any passenger or freight of any description upon its railroad for any distance within this state, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation of any passenger or like quantity of freight of the same class over a greater distance of the same railroad." The state of Texas, by statute in 1883, declared that: "if any railroad company shall charge one person more for transporting freight of the same class, in equal or less quantities, over its road for the same or a less distance than it charges an-

other for the same or a greater distance, all such discriminating rates, charges or collections, whether made directly or by means of any rebate or other shift or evasion, shall be considered and taken as *prima facie* evidence of extortion and unjust discrimination, which is hereby prohibited and declared unlawful." The state of Connecticut, by statute in 1885, enacted that "no railroad company shall charge or receive for the transportation of freight to any station on its road, a greater sum than is at the time charged or received for the transportation of the like kind and quantity of freight from the same original point of departure and under similar circumstances, to a station at a greater distance on its road in the same direction. Two or more railroad companies whose roads connect, shall not charge or receive for the transportation of freight to any station on the road of either of them, a greater sum than is at the time charged or received for the transportation of a like kind and quantity of freight from the same original point of departure, and under similar circumstances, to a station at a greater distance on the road of either of them, in the same direction. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges; and the road of a company shall include all the road in use by it, whether owned or operated under a contract or a lease." In this provision it will be seen that for the first time in the enactments or constitutional provisions of the several states quoted, an exception appears of cases where the transportation is under different circumstances. The state of Oregon, by act bearing date 1885, declared that "it shall be unlawful for any person engaged in the transportation of property as provided in the first section of this act, to charge or receive any greater compensation for a similar amount or kind of property for carrying, receiving, storing, forwarding or handling the same, for a shorter than a longer distance, in the same direction."\*

\*NOTE.—The provisions of the Hoult Law (Oregon), passed Feb. 20, 1885, leaving to railroad companies the right, under certain limitations, to fix freights, and declaring the charging of more for a shorter than for a longer haul in the same direction an unjust discrimination, are repealed by the Oregon act of

It will thus be seen that eighteen of the states, previous to the passage of the Act to Regulate Commerce, had by statute or by constitutional amendment, beginning in 1850 and from then on to 1885, made illegal the charging of a greater compensation for transportation by railroad companies for a shorter than was charged for a longer distance over the same line in the same direction. Some of the provisions were broad and general, while others were narrow and failed to cover all cases which might arise of the kind specified. But with the single exception of the statute of Connecticut, the rule prescribed by them admitted of no exceptions. The Connecticut statute, as has been seen, did not make a greater charge illegal when the circumstances were not similar. The states of Missouri, Minnesota and Nebraska, by statute, in the same year in which the Act to Regulate Commerce was passed, made provision in general harmony with that in the Act of Congress upon this subject, and Iowa and the two Dakotas have done the same thing since. It is thus seen that fully one half of the states of the Union, by enactments covering a period of forty years, have declared the principle of the long and short haul clause of the fourth section of the Act to Regulate Commerce to be sound, just and politic, and have been enforcing it, without any considerable objection being made to it from any source. The business of the railroads in these states, so far as it was purely state business, has been made to conform to it, and it is reasonable to suppose that if the managers had found it to work seriously to their detriment there would long since have been organized energetic efforts to change the laws of the states in this particular. No such effort has been made.

Nevertheless, as in interstate commerce there were a vast number of cases in which the greater charge was made upon the shorter haul at the time of the enactment of the law to regulate commerce, it was but natural and reasonable that Congress should proceed cautiously, deliberately and with some regard to the existing state of things, in putting in force this wise and salutary

Feb. 20, 1891 (2 Hill's Code, 2d ed. p. 1967) leaving to a commission the power to fix rates, subject to a decree of the courts as to their reasonableness. *State v. Rogers*, 22 Or. 348.

provision. It was but prudent it should make the exceptions it did, permitting of the greater charge on the shorter haul when the conditions and circumstances should seem to justify it, and even permitting what may be called a suspension of the law in special cases, if, in the opinion of the commission appointed to regulate interstate traffic, it should seem after investigation to be reasonable to do so. This permission, however, the commission has not, as yet, been called upon to exercise. It has in some cases been required to decide upon the question whether such conditions and circumstances existed as would warrant the exceptions made by the carriers themselves, but in the main conformity to the law of the fourth section has been so general, and the exceptions made were based upon such reasons of *prima facie* necessity, that the supposed autocratic power of suspension has never even been invited. The provision authorizing the commission, upon application in special cases, and after investigation, to allow a carrier to charge less for longer than for shorter distances for the transportation of passengers or property, was made in the interest of the carriers, and with a view to relax still more the rule of the statute, and to relieve it entirely from anything like a rigid and unyielding character. The investigation and the showing of reasons are conditions precedent, and the authority is therefore as carefully limited as public powers of a discretionary nature can be. In the requirement of an investigation it is assumed that all parties concerned will have opportunity to be heard, and that the interest of all will be considered, and the commission is authorized from time to time to prescribe the extent to which the carrier may be relieved from the operation of the general rule. The power formerly exercised by the railroad companies was under no legal supervision; it was subject to no requirement of previous investigation; it might be, and commonly was, exercised without opportunity to the parties who must pay the exceptional and oppressive rates to be first heard in respect to their imposition, and without considering any other interests than those of the carriers imposing them. It was therefore a despotic authority pure and simple; and when contrasted with it, the authority which may now be exercised by the commission sinks into insignificance.

The former was autocratic and unchecked ; the latter, as is proper in governmental powers, is specially limited and regulated with a view to the protection of all just equities.

It is a very significant fact, as bearing upon the propriety of this section of the law, that in the convention of railroad commissioners, national and state, held at Washington, a resolution was adopted by a strong vote of the state commissioners "that it is expedient that the laws of the several states should be in exact harmony with the provisions of the Interstate Commerce Act" in, among other things, "the regulation of the relations between rates of compensation to be allowed for long and short hauls." This declaration comes from a body of men the great majority of whom, although they represent the people of their several states, and may be supposed to have their interests specially in view in what they do on the subject of the regulation of railways, have never been accused of hostility to railroad interests, or of having injured them by the manner in which they have performed their public duties. Prior to the enactment of the Act to Regulate Commerce, the railway commission in England had, by its decisions, recognized the same principle, although not required to do so by the express words of the statutes under which it was acting.

Carriers are required to judge in the first instance with regard to the similarity or dissimilarity of the circumstances or conditions that forbid or permit a greater charge for a shorter distance. But the judgment of carriers in respect to circumstances and conditions is not final and is subject to authority of the Commission and of the courts to decide whether error has been committed or statute violated. In case of complaint for violation of section 4, the burden of proof is on the carrier to justify any departure from the general rule prescribed by statute, by showing that circumstances and conditions are dissimilar.<sup>1</sup> Complainant must not necessarily have pecuniary interest to be entitled to be heard. The Vermont State Grange was held to have such interest that it might raise the question and a proceeding was held maintainable upon its petition.<sup>2</sup>

<sup>1</sup> *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278.

<sup>2</sup> *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571.

A complaint, in effect asking from the commission an order requiring defendant roads to receive freight at Schenectady for transportation to Boston, for rates less than are now charged by some roads for transportation of like freights to Boston from stations nearer Boston, under substantially similar circumstances and conditions was dismissed.<sup>1</sup> The commission will not grant a general suspension of section 4 of the Act, but will give relief only as to traffic between specified points. While the Act authorizes the commission to permit exceptions, it does not authorize it to require exceptions.<sup>2</sup>

Where in a proceeding against several connecting roads for violation of section 4, one claims that its only participation consisted in sharing in low charges on long haul, complaint should not be dismissed as against it.<sup>3</sup> Section 1, requiring charges to be reasonable, and section two, forbidding unjust discrimination, apply when exceptional charges are made under section 4, as they do in other cases. The prohibition in section 4 of the Interstate Commerce Act is limited to cases in which circumstances and conditions are substantially similar.<sup>4</sup> The furnishing of free cartage at one place, and not at another at a less distance from the point of shipment, is a violation by a railway company of the long and short haul clause of the Interstate Commerce Act, where the transportation is under substantially similar circumstances and conditions.<sup>5</sup> It is not a justification for charging more for a shorter than for a longer distance that the traffic which is subjected to such greater charge is way or local traffic; nor that the shorter haul traffic is more expensive to the carrier; nor that the lesser charge has for its motive the encouragement of manufactures or some other branch of industry; nor that it is designed to build up trade centers; nor that the lesser charge for the longer haul is merely a continuation of favorable rates under which trade

<sup>1</sup> *Thatcher v. Fitchburg R. Co.* 1 Inters. Com. Rep. 356.

<sup>2</sup> *Thatcher v. Fitchburg & A. R. Co.* 1 Inters. Com. Rep. 22.

<sup>3</sup> *Boston & A. R. Co. v. Boston & L. R. R. Co.* 1 Inters. Com. Rep. 571.

<sup>4</sup> *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278.

<sup>5</sup> *Interstate Commerce Com. v. Detroit, G. H. & M. R. Co.* 4 Inters. Com. Rep. 722, 57 Fed. Rep. 1005.

centers or industries have been built up.<sup>1</sup> The fact that freight has paid a local rate to reach a longer distance point will not justify a greater charge upon similar freight from a shorter distance point. A less charge to a longer distance point is not justified by the fact that the freight is to be carried in cars of connecting lines which have come to such point loaded and are to be returned, which circumstances do not exist in favor of the shorter distance point. A difference in bulk and value of lumber does not justify a greater charge to a short distance point than to a longer one, when the carriers, in their published rate sheets, put the lumber in the same class and at the same rate.<sup>2</sup> The grouping by a railroad company, as stations to which the freight rates from the far east may properly be made the same, of two stations, is a conclusive admission by it that, so far as the transportation from the east to its warehouses at such stations is concerned, it is under substantially similar conditions and circumstances.<sup>3</sup> A railroad company violates the Interstate Commerce Law by forwarding grain from Nebraska through Iowa to Chicago, Illinois, at a less rate than it charges to Chicago from points in Iowa through which the grain from Nebraska passes, although the grain from Nebraska is technically to be delivered at points in Illinois some distance from Chicago.<sup>4</sup>

The only practical method yet devised for making through export rates is to add to the established inland rates from the interior to the seaboard the current ocean rates. Rates ten cents or more per hundred pounds less on export traffic from the point of shipment to New York than is charged on like commodities from the same point to New York as the point of destination will be deemed unjust and unlawful discrimination, in the absence of a showing to the contrary.<sup>5</sup> When freight is hauled to the sea-

<sup>1</sup> *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278.

<sup>2</sup> *James v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 609.

<sup>3</sup> *Interstate Commerce Com. v. Detroit, G. H. & M. R. Co.* 4 Inters. Com. Rep. 722; 57 Fed. Rep. 1005.

<sup>4</sup> *Junod v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 663; 47 Fed. Rep. 290.

<sup>5</sup> *New York Produce Exch. v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 553.

board for export, or to New England points, from the northwestern states or territories, or *vice versa*, through Detroit, the rule that the estimated portion of the through rate from the starting point to Detroit may be lower in proportion to distance than the rate upon freight from such point destined to Detroit, cannot be sustained.<sup>1</sup> The Chicago & Northwestern Railway Company has two routes or lines between Chicago & Sioux City, formed by its main line and different branch lines; and a greater charge for a shorter than for a longer distance in the same direction, the shorter being included in the longer distance, on either of said routes or lines, is unlawful, under the Act to Regulate Commerce, § 4.<sup>2</sup> The question of a greater charge in the aggregate for a shorter than for a longer distance over the same line in the same direction is not to be determined by the proportions allotted to different roads on the line, but by the rate as an entirety.<sup>3</sup>

The rule expressed by the Act to Regulate Commerce, § 4, that distance shall ordinarily limit the adjustment of rates, is not rendered inoperative by the existence at one point of converging lines subject to the Act; for the law applies to each of these lines, and neither can put in rates to that point which are lower than shorter distance charges on its line until, upon a showing of special considerations grounded in justice to its patrons and itself, it obtains permission from the regulating authority so to do. This principle applies both to lines between the same points and to lines reaching the same destination from different points of consignment.<sup>4</sup> A joint tariff arrangement between a railroad company and other roads will not relieve it from liability to one injured by its violation of the Interstate Commerce Law in charging more for a short than a long haul under the same conditions.<sup>5</sup> Where two or more roads forming a continuous connecting line between points in different states bill and carry interstate traffic

<sup>1</sup> *Detroit Board of Trade v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 199.

<sup>2</sup> *Northwestern Iowa Grain & S. S. Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431.

<sup>3</sup> *Imperial Coal Co. v. Pittsburg & L. E. R. Co.* 2 Inters. Com. Rep. 436.

<sup>4</sup> *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267.

<sup>5</sup> *Osborne v. Chicago & N. W. R. Co.* 48 Fed. Rep. 49, 49 Am. & Eng. R. Cas. 12.



through to certain stations on the last road forming such line, neither the roads together nor any one of them can evade the obligations of the Act to Regulate Commerce, § 4, by declaring that as to such traffic destined to such stations on such terminal road it is a local carrier.<sup>1</sup> Where several companies join in joint tariff, those making greater charges must justify it. Companies permitting through business to be done over their tracks, by the National Despatch line, are responsible for long haul rates. Where in a proceeding against several connecting roads for violation of section 4, one claims that its only participation consisted in sharing in low charges on long haul, complaint should not be dismissed as against it.<sup>2</sup>

The competition between two roads does not of itself justify the greater charge upon the shorter haul, nor does the fact that one company makes the charges unreasonably low between two points.<sup>3</sup> Competition of carrier with carrier, both of which are subject to the Act to Regulate Commerce, is as much within the terms of § 4, limiting the short and long haul clause to similar conditions, as competition with a carrier not subject to the Act.<sup>4</sup> The competition of markets on different lines, for the sale of commodities at a given point served by both lines, does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the Act to Regulate Commerce, § 4, in charging more for shorter than for longer distances over their lines.<sup>5</sup> There is no competition by rail over the Canadian Pacific Railway, or by water around Cape Horn, that justifies a departure from the "long and short haul rule" of the statute in the transportation of refined sugar from San Francisco to Fargo and through Fargo to St. Paul.<sup>6</sup> In the absence of competition

<sup>1</sup> *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682.

<sup>2</sup> *Boston & A. R. Co. v. Boston & L. R. R. Co.* 1 Inters. Com. Rep. 571.

<sup>3</sup> *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137.

<sup>4</sup> *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332.

<sup>5</sup> *Trammell v. Clyde S.S. Co.* 4 Inters. Com. Rep. 120.

<sup>6</sup> *Raworth v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 857.

from Canadian railways (which are not subject to the Interstate Commerce Act) the circumstances and conditions of the traffic from San Francisco to Denver are not so materially different from those of the traffic from San Francisco to the Missouri river as to justify the transcontinental roads subject to the Act in charging a greater sum for the shorter distance.<sup>1</sup> When a difference in rates on grain and grain products is unreasonable, the relation of local to through rates should not be unduly disproportioned.

Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions. With a joint through rate over the same line, mileage is usually an element of importance and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges. When rates on the line of a carrier are on the face disproportionate or relatively unequal, the burden is on the carrier to justify them when challenged. Grain and grain products classified alike are presumably entitled to equal rates, and if a difference is made by a carrier it assumes the burden of sustaining it by satisfactory evidence. Upon complaint against the Grand Trunk railway of Canada for alleged unreasonableness of a rate of eight cents a hundred pounds on grain and ten cents a hundred pounds on grain products from Port Huron to Buffalo, as compared with a through rate of fifteen cents a hundred pounds from Chicago to Buffalo over the line formed by that road and the Chicago & Grand Trunk, it was held that though the local rate from Port Huron to Buffalo might be regarded as disproportionate on the basis of distance alone, other considerations are involved, and in view of the terminal and ferry expenses at Port Huron, the Niagara bridge charges and the Buffalo terminal expenses, all of which are borne by the Grand Trunk Railway of Canada alone upon business originating at Port Huron, the complaint against the eight-cent rate on grain is not sustained; but no good reason having been shown for a higher rate on grain products, that portion of the complaint is sustained

<sup>1</sup> *Martin v. Southern Pac. R. Co.* 2 Inters. Com. Rep. 1.

and the products ordered to be carried at the same rate as grain.<sup>1</sup>

In the case of the Board of Trade of Chattanooga against the East Tennessee, Virginia & Georgia Railway Company and others, the complaint alleged that the rates on traffic from New York and other Atlantic seaboard points to Chattanooga are unreasonable in themselves and relatively, as compared with rates on like property to Memphis and Nashville, and that rates on such traffic are greater for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Memphis and Nashville. It is said that defendants are justified by the existence of water competition of controlling force in charging less on such traffic for the longer distance to Memphis, but that no such competition exists for such traffic to Nashville, and any greater charge for the transportation of like kind of property from said seaboard points for the shorter distance to Chattanooga than for the longer distance through Chattanooga to Nashville is in violation of the fourth section of the Act to Regulate Commerce. Defendants ordered to cease and desist from making such greater charges to Chattanooga, with leave to file application for relief under the proviso clause of the fourth section within a specified time. Competition with carriers not subject to the statute is based upon natural causes and plain conditions, but the legitimate force of competition with carriers subject to the Act depends upon compliance with the law by each of the competitors and the special circumstances and primarily indefinite conditions in each particular case.<sup>2</sup> The right to make greater charges for a short than for a long haul depends upon peculiar circumstances and conditions of each case.<sup>3</sup> The general rule that the cost is less per ton per mile on long than on short hauls is subject to exceptions, and one of these is found where the

<sup>1</sup> *McMorran v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

<sup>2</sup> *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267; *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.

<sup>3</sup> *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 571; *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278.

business on the long haul goes over different divisions of a line, necessitating extra handling and switching.<sup>1</sup>

A local charge by a railroad company greater than a through joint tariff charge made by it and another company for a longer haul does not violate the long and short haul clause of the Interstate Commerce Act.<sup>2</sup> Carriers may lawfully accept the same aggregate, though less profitable, rates for longer distances, provided they do not "subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."<sup>3</sup> The joint use of the same track by different railroad companies does not constitute them the same "line," under the long and short haul clause in § 4 of the Act to Regulate Commerce, so as to compel either company to graduate its tariff by that of the other. As between the short and long haul, competition may exist to such an extent that what would otherwise be similar circumstances and conditions will be dissimilar.<sup>4</sup> The doctrine that an estimated proportion of the through rate must not be less according to distance than the local rate from an intermediate point to another point named in the line covered by the through rate is untenable.<sup>5</sup> Besides terminal expenses and other aggregate charges not depending upon the distance freight is moved, there are other conditions which justify a lower proportionate charge for longer distances.<sup>6</sup> When rates from any cause are made greater for shorter than for longer distances, the difference between such rates must in no instance be unreasonable.<sup>7</sup> Rates having been established from St. Louis to Omaha in view of the distance over

<sup>1</sup> *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65.

<sup>2</sup> *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 53 Am. & Eng. R. Cas. 18, 52 Fed. Rep. 912.

<sup>3</sup> *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 632.

<sup>4</sup> *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332.

<sup>5</sup> *Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 248.

<sup>6</sup> *Cove v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

<sup>7</sup> *Gerke Brew. Co. v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 267.

the Wabash line, the action of the Missouri Pacific in meeting the Wabash rates, although too low to be greatly desirable for its longer line, and involving loss of former revenue at intermediate points on the main line south of Omaha, by the application to the situation of the long and short haul clause of the Interstate Commerce Act, cannot be properly criticised.<sup>1</sup> A joint rate between two railroad companies, constituting a new line, does not furnish a basis upon which either is bound to adjust its own local tariff. A carrier may charge a local rate between points on its own line greater than its part of a joint rate made with another connecting road, although the distance between such points is less than that for which the joint rate is paid and the circumstances are similar.<sup>2</sup>

The making of a "group rate," or the charging of the same price for a shorter as for a longer haul, is not within the provisions of a statute prohibiting the charging of one shipper a greater rate than another for the same or a shorter haul.<sup>3</sup> The statute is as follows: "Railroad companies may charge and receive not exceeding the rate of fifty cents per one hundred pounds per one hundred miles for the transportation of freight over their roads; but the charges for transportation on each class or kind of freight shall be uniform, and no unjust discrimination in the rates or charges for the transportation of any freight shall be made against any person or place on any railroad in this state, and it shall be prima facie evidence of an unjust discrimination for any railroad company to demand or receive from one person, firm, or company a greater compensation than from another for the transportation in this state of any freight of the same kind or class in equal or greater quantities for the same or a less distance, which prima facie evidence may be rebutted by competent testimony on the part of such company, showing that the discrimination, if any, was not an unjust one, and the question upon an issue as to whether any alleged discrimination is unjust or not shall be a question of fact to be tried and determined as any other issue of

<sup>1</sup> *Lincoln Board of Trade v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 98.

<sup>2</sup> *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229.

<sup>3</sup> *Texas & P. R. Co. v. Kuteman*, 54 Fed. Rep. 547; *Texas & P. R. Co. v. Kuteman*, 79 Tex. 465, distinguished.

fact in a case: provided, that when the distance from the place of shipment to the point of destination of any freight is fifty miles or less, a charge not exceeding thirty cents per one hundred pounds may be made for the transportation thereof.”<sup>1</sup>

<sup>1</sup>Tex. Rev. Stat. art. 4557; *Texas & P. R. Co. v. Kuteman*, 54 Fed. Rep. 547.

## CHAPTER XVII.

### COMPETITION, DISCRIMINATION AND CONTINUOUS CARRIAGE — CONTINUED.

§ 117. *Water Transportation a Controlling Factor.*

§ 118. *Railways Need not Make Through Rates with Water Craft.*

§ 119. *Through Routes and Through Rates.*

§ 120. *Combinations between Rival Carriers.*

§ 121. *Rebate Contract to Repay the Shipper a Part of the Rate.*

#### § 117. *Water Transportation a Controlling Factor.*

It was no part of the purpose of the Act to drive water carriers out of business by means of rates for transportation by rail relatively unjust as between the patrons of the latter method of carriage; and the carriers by rail do not establish the legality of the greater charge upon the shorter haul by merely showing that the longer haul is in competition with water transportation. They must show in addition to this that the greater charge on the shorter haul, if questioned, when compared with that made on the longer haul, is, when all the conditions and circumstances are considered, relatively just and fair as between its patrons at its several stations affected. It having been conceded that the existence of water competition may constitute such a difference in the conditions and circumstances of transportation as will justify the greater charge on the shorter haul in some cases, some carriers appear to have assumed that they are, in a clear case of that nature, entirely absolved from any obligation to make the charge at the point of water competition bear any proportion whatever to the charges at other points, but that they may in their discretion lower the former to any extent necessary to enable them to take the business from water carriers and still maintain the rates on shorter hauls at what they would have been if no such lowering had taken place. The result would be in some cases, if the

rates made by the roads were allowed to stand, that points where there was water competition to any extent, however small, would be given an advantage in railroad transportation that would be absolutely destructive to previously existing competition of other towns of equal or greater importance on the same lines of railway. In such a case there may be double wrong; first, in the unjust discrimination as between the points served by the railway, and, second, in the driving of water carriers out of the business by rates which are made so low as to be unremunerative, the loss to the carriers by rail being made up by charges on other business higher than would otherwise be necessary. Such a method of making rates is not in accordance with the intent of the law, which has for its object to accomplish justice and establish, as nearly as is practicable, equality of right in the matter of transportation by public agencies.

Water competition, to justify a greater charge for a shorter distance, must be competition in transportation to the longer distance point, and as to freight which, if not carried over the line on which it is located, would reach such destination by water transportation.<sup>1</sup> Possible competition will not justify such greater charge under the provisions of the 4th section of the Act to Regulate Commerce.<sup>2</sup> Active competition by water and other railroads at a terminal point, for the transportation of certain goods, renders the circumstances and conditions substantially dissimilar, and justifies a railroad company in charging a less rate to such point than to an intermediate noncompeting point, when necessary to meet such competition.<sup>3</sup> But the presence of combined rail and water competition at a longer distance point will not justify a greater charge to a shorter distance point, where such competition is of greater force and more controlling than at the former point.<sup>4</sup> Water competition cannot justify charges three

<sup>1</sup> *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682.

<sup>2</sup> *San Bernardino Board of Trade v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 138.

<sup>3</sup> *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.* 50 Fed. Rep. 295. See also *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777.

<sup>4</sup> *James v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 609.



times as great for shorter distances as those for longer distances.<sup>1</sup> The English Railway and Canal Traffic Act permits special rates of carriage to a terminus to which traffic can be carried by other modes of carriage, with which the carrier is in competition.<sup>2</sup> When water competition is alleged to justify rates in any case under the statute the carrier must affirmatively show by proof which does more than create a presumption, and which clearly establishes that such competition is a controlling factor in the transportation of traffic important in amount from the point in question.<sup>3</sup> Active competition by water and other railroads at a terminal point, for the transportation of certain goods, renders the circumstances and conditions substantially dissimilar, and justifies a railroad company in charging a less rate to the former than to the latter point from those affecting an intermediate noncompeting point, when necessary to meet such competition.<sup>4</sup>

The only justification for a through rate less than an intermediate rate on the same article is the compulsion of rail carriers to accept the reduced compensation or suffer ocean rivals to perform the service; and where the pressure of this alternative is not felt, there is no ground upon which the lower through charge can be excused.<sup>5</sup> If ocean competition can create a similar condition which is to be considered in determining whether discriminations against particular classes of traffic are unjust, ocean competition from Liverpool to San Francisco will not justify a railroad company in taking goods imported from Liverpool by way of New Orleans, from New Orleans to San Francisco at a rate slightly in excess of the cost of transportation but less than a third of the regular inland rate.<sup>6</sup> The "drive" of shingle logs

<sup>1</sup> *Rice v. Cincinnati, W. & B. R. Co.* 3 Inters. Com. Rep. 841.

<sup>2</sup> *Foreman v. Great Eastern R. Co.* 2 Nev. & McN. 202.

<sup>3</sup> *Ex parte Koehler*, 1 Inters. Com. Rep. 317; *Hurvell v. Columbus & W. R. Co.* 1 Inters. Com. Rep. 631; *James v. Canadian Pac. R. Co.* 4 Inters. Com. Rep. 274.

<sup>4</sup> *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 323.

<sup>5</sup> *Merchants Union of Spokane Falls v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 183.

<sup>6</sup> *Interstate Commerce Com. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 408, 57 Fed. Rep. 948.

down rivers which flow past the place of cut in Maine to a seaport in Canada where shingle mills are located, and from which the product may go by sea to market ports, affects shingle traffic from competing mills located along these rivers at a place in Canada and a place in Maine, but operates with less force at the latter point. The rail rate from the Canadian mill to market being fixed with especial reference to the effect of the log drive to and water competition for shingle traffic from the seaport, the rate from the Maine mill should be made upon the same basis.<sup>1</sup> The competition between all water lines and the all rail lines in the carriage of petroleum and its products from the port of New York to San Francisco, Oakland, Sacramento, Stockton, Marysville, San Jose, and San Diego, in the state of California, is actual, and involves the transportation of traffic important in amount, and warrants the all rail lines in making such just and reasonable rates as will enable them to meet the low rates and competition of the competing all water lines and of the competing part water and part rail lines at said points; and in doing so they are not obliged to make their rates at intermediate points as low as the rates forced upon them by the competition.<sup>2</sup> There is no competition by rail over the Canadian Pacific Railway, or by water around Cape Horn, that justifies a departure from the "long and short haul rule" of the statute in the transportation of refined sugar from San Francisco to Fargo and through Fargo to St. Paul.<sup>3</sup> Any advantages which enure to Michigan salt manufacturers as against those of Kansas, from rates to points in Iowa, Illinois, Missouri, and Nebraska, are advantages arising from natural situation; and a low rate to Missouri river points is influenced by water competition and also by the heavy preponderance of east bound freight over west bound freight.<sup>4</sup> In the Merchants Union of Spokane Falls, against the Northern Pacific Railroad Company and the Union Pacific Railroad Company, the points decided are as follows: 1. By rail from eastern points to the "Pa-

<sup>1</sup> *James v. Canadian Pac. R. Co.* 4 Inters. Com. Rep. 274.

<sup>2</sup> *Rice v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 263.

<sup>3</sup> *Ruworth v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 857.

<sup>4</sup> *Anthony Salt Co. v. Missouri Pac. R. Co.* 4 Inters. Com. Rep. 33.

cific coast terminals," Portland, Tacoma, and Seattle, is affected by the competition of water carriers, but such competition does not affect like transportation from said points to the city of Spokane. Held, therefore, that defendants are justified in maintaining higher rates on shipments from said points for the shorter distance to Spokane than for the longer distance to said Pacific terminals. 2. Held, that the only justification for a through rate less than an intermediate rate on the same article is the compulsion of rail carriers to accept the reduced compensation or suffer ocean rivals to perform the service, and where the pressure of this alternative is not felt there is no ground upon which the lower through charge can be excused. 3. In the matter of carload and mixed carload rates, defendants are required to allow the same privileges on shipments to Spokane as are provided or allowed on like shipments to Portland or other Pacific coast terminals. 4. "Blanket" class rates upon the Northern Pacific road for a distance of over 580 miles are held unreasonable; defendants ordered to desist from charging rates on property from eastern points to Spokane, which materially exceed the two per cent of class rates now in effect both to Spokane and Pacific coast terminals.<sup>1</sup>

The possible influence of water competition upon rates for the transportation of oranges, and the nonexistence of such competition in the carriage of berries because the latter cannot be carried by water in any considerable quantities, does not authorize railroads from Florida to New York to take advantage of the situation and charge unreasonable rates on berries.<sup>2</sup> Where the competition of an independent water line, not subject to the provisions of the Act to Regulate Commerce, is actual with that of a rail carrier for traffic at a point reached by it, and for traffic important in amount, a dissimilarity of circumstances and conditions is shown to exist,<sup>3</sup> then the rail carrier if necessary to meet such

<sup>1</sup> *Merchants Union of Spokane Falls v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 183.

<sup>2</sup> *Perry v. Florida Cent. & P. R. Co.* 3 Inters. Com. Rep. 740.

<sup>3</sup> *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777; *King v. New York, N. H. & H. R. Co.* 3 Inters. Com. Rep. 272.

competition may lower its rates at that point without doing so at other points on its line at which no such competition exists, and at which other points the rail carrier could not so reduce its rates without a large loss of revenue.<sup>1</sup>

A full discussion of the rule and the grounds upon which it rests will be found in these decisions. The principle found running through them all is that the statute in express terms having provided that the circumstances and conditions must be substantially similar in the performance of each service, in the longer as in the shorter haul, the existence of such competition as that above stated at one point between a carrier subject to the law, and one that is not subject to the law, creates at that point circumstances and conditions which are substantially dissimilar, in the service performed by the rail carrier, to those existing at other points on its line where no such competition exists. In such a case the rail carrier is not obliged to go out of the business at a point where such competition with an independent water line prevails, leaving to the water line a monopoly of that business; nor is the rail carrier, on the other hand, compelled to lower its rates at other points along its line, where no such competition is found, to the standard of the rate it is compelled to make to meet the competition of the water line at the point where such competition does exist; but the rail carrier may lower its rates at the point at which it has to encounter such competition and in lowering them may make such just and reasonable rates in view of all the circumstances and conditions surrounding its business as will enable it to meet the competition of the independent water line at that point.<sup>2</sup> Through rates on long hauls more usually than local rates on short hauls encounter water competition and are made lower in proportion to distance by this cause as well as other causes which have been repeatedly discussed and considered by the Interstate Commerce Commission; and the doctrine that an estimated proportion of the through rate must not be less according to distance than the local

<sup>1</sup> *Re Southern R. & SS. Asso.* 1 Inters. Com. Rep. 278; *Harwell v. Columbus & W. R. Co.* 1 Inters. Com. Rep. 631; *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777.

<sup>2</sup> *King v. New York & N. H. R. Co.* 3 Inters. Com. Rep. 272.

rate from an intermediate point to another point named in the line covered by the through rate, has often been held to be untenable.<sup>1</sup>

In the transportation charges on lumber carried from Johnson City, Tenn., to Boston, Mass, the rate of which complaint is made is 36 cents per 100 pounds of lumber in the carload for a distance of 911 miles, though from the more distant point of Atlanta, Ga., 1240 miles, a lower rate of 34 cents is charged, which is alleged to be in violation of the fourth section of the Act to Regulate Commerce. From Macon, Ga., to Boston, the freight charge is the same as from Johnson City, 417 miles the shorter distance, over the same line. The commission holds that combined rail and water competition at a longer distance point does not justify a greater charge for shorter distance, while the shorter distance rate is maintained by the carrier at points where the competition is of greater force and more controlling than at the longer distance point. Such greater charge is not justified by the fact that local rates have been first paid on lumber to the longer distance points, nor by the fact that the freight is shipped in cars from the longer distance points which brought machinery to those points and for which profitable return loads were not always to be had; nor by a difference in the bulk and value of the lumber when the published rate sheets put the lumber in the same class and at the same rate. While distance is not always a controlling element in determining what is a reasonable rate, there is ordinarily no better measure of railroad service in carrying goods than the distance they are carried, and when the rate of freight charges over one line in sending freight carried from a neighboring territory to the same market is considerably greater than over other lines for distances as long or longer, such greater rate is held to be excessive and should be reduced. The rate on lumber from Johnson City to Boston should not exceed 33 cents per hundred pounds. A long line met at a given point by a short line, and compelled to accept a scarcely remunerative rate, may, when that

<sup>1</sup> See *Detroit Board of Trade v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 202; *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777; *Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 248.

point is passed, increase its charges, with some consideration of the absolute distance by its own line from the originating point, in a ratio more rapid than if it had been able to grade its own rates continuously throughout its line.<sup>1</sup> The application of the above principle is also affected by water competition; and a situation upon a navigable river, although not at present affording active competition with the railroad, is to be considered. Exceptional conditions exist in respect to railroad transportation in proximity to the waterways of the Great Lakes, Michigan and Superior, and to rival competing railway lines operating between the ports on these lakes, as to the method of grouping stations, under the combined effect of the competition of these waterways and of the Act to Regulate Commerce, § 4.<sup>2</sup>

A line of steamships plying between New York and Boston every other day makes the distance in twenty-four hours, does the largest part of the carrying trade of the grocers of Boston on shipments from New York, carries flour from New York to Boston for 8½ cents per hundred pounds; other lines, part water and part rail, known as the "Sound Lines," make daily trips between New York and Boston, and carry flour from New York to Boston at 9 cents per hundred pounds; an all rail line composed of the lines of the defendants upon through billing and through rates to Boston alone on shipments from New York makes daily runs between these points and carries flour from New York to Boston at 9 cents per hundred pounds; each and all of these carriers are in actual competition for this business and it involves the carriage of traffic important in amount. Upon the facts it was resolved by the commission, that this is a case in which the circumstances and conditions in the carriage of this commodity are substantially dissimilar at Boston from those existing at Readville, an interior town about eight miles from Boston, on the line of the all rail carriers, where no competition exists between the all rail carriers and the water lines, and this fact justifies the all rail carriers in meeting the rate by the water line at Boston by charging 9 cents

<sup>1</sup> *Lincoln Board of Trade v. Burlington & M. R. R. Co.* 2 Inters. Com. Rep. 95.

<sup>2</sup> *Lincoln Board of Trade v. Burlington & M. R. R. Co. supra*; *Business Mens Assn. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 48.

per hundred pounds on flour, while the combined local rates of the two rail carriers are higher upon shipments of this kind of freight from New York to Readville than they are upon the joint through rate from New York to Boston. The all rail line is composed of two separate and distinct lines of railroad, owned by two separate and distinct corporations; but by an arrangement these two corporations make joint through rates on all business from and to New York and Boston passing over their lines, and for this business they furnish fast freight trains which stop at no stations between New York and Boston and have the right of way over all other freight trains; as to all other points along their lines, however, they each charge their local rates, and this business is done by way freight trains of each company respectively for itself and on its own account; all of which methods and rates in each instance are duly advertised in their published tariffs. On the facts herein above stated, a firm of dealers in the city of Boston ordered a consignment of flour from New York to Readville by the all rail lines, and subsequently claimed in their complaint to the Commission that they should have been charged for this service the through rate to Boston and not the local rates of the defendants from New York to Readville. But it was decided that complainants are mistaken as to their rights in this matter and that the complaint cannot be sustained. According to the evidence, the cost of service is far less expensive to the carrier in doing the through business than in doing separately, each for itself, the combined local business of the two railroad companies. It does not appear that the through rate to Boston is unreasonably low; nor does it appear upon the evidence that the local rates of these two railroad companies are unjust and unreasonable.

The joint through rate to Boston on flour is one that is forced upon the all rail carriers by the competition of a water line not subject to the Act to Regulate Commerce, and is a rate, low as it is, in which there is a small margin of profit to the all rail carriers, while the combined local rates to Readville, although considerably higher, relate to a service that is wholly different in all its material features, methods and aspects, rendered by the carriers under

circumstances and conditions that are substantially dissimilar.<sup>1</sup> A lower charge for a longer distance for transportation of like traffic may be justified by actual water competition of controlling force, relating to traffic important in amount; and among the circumstances and conditions that may be considered in estimating the dissimilarity created by water competition are the character of the roads, the character of the traffic, the preponderance of empty cars moving in a direction in which the traffic must be taken, and the legitimacy of the competition by the rail carrier. The transportation of traffic under circumstances and conditions that force a low rate for its carriage or an abandonment of the business, but which affords some revenue above the cost of its movement, and works no material injustice to other patrons of a carrier, is to be deemed legitimate competition. When, however, its carriage is at a loss, and imposes a burden on like traffic at other points and on other traffic, it is to be deemed destructive and illegitimate competition. Rates cannot be arbitrarily charged in the mere discretion of a carrier. They are to be equitably adjusted with regard to the public interests as well as the carrier's. Reduced rates at points where competitive influences are controlling must not fall below some revenue from the traffic in excess of cost, and higher rates at other points, required for the necessary revenue of a carrier, must be reasonable in themselves, and also relatively reasonable in comparison with the competitive rate. The general rule contemplated by the statute of equitably graduated charges on like traffic with reasonable reference to the amount of the service, is just in itself, and commonly most beneficial both to the carriers and to the public, and is only to be departed from when justified by exceptional conditions, and in such instances no longer than the conditions require. Where a reduced rate is made at the terminus of a through route, under the compulsion of competition, a town not located on the line of the through route, but reached over a lateral connection road, has a disadvantage of situation entailing some additional expense, and a reasonably higher rate to such town than the forced competitive rate to

<sup>1</sup> *King v. New York & N. H. R. Co.* 3 Inters. Com. Rep. 272.



the more distant terminus of the through route is not unjust discrimination. Upon complaint by dealers at Humboldt, Kan., against the respondent lines for unjust discrimination in charging a rate of 65 cents per hundred pounds on sugar transported from San Francisco to Kansas City, and 85 cents per hundred pounds upon the same commodity from San Francisco to Humboldt, more than a hundred miles shorter distance but not on the through line, it was ruled that the reduced rate to Kansas City being forced upon the carriers by competitive conditions beyond their control, and the rate to Humboldt not being unreasonable in itself but lower than it would be except for the influence of the competitive conditions at Kansas City, and it not appearing that substantial injustice results from the higher rate at Humboldt, the lower rate to Kansas City and the higher rate to Humboldt are not deemed to be in contravention of the statute.<sup>1</sup>

§ 118. *Railways Need not Make Through Rates with Water Craft.*

In *Napier v. Glasgow & S. W. R. Co.* 1 Nev. & McN. 292, the railway extended from Glasgow to Androssan and made through rates for the carriage of freight and passengers from points on its line to Belfast, Ireland. That portion of the carriage from Androssan to Belfast was by the water lines. The proportion of the through rate from Glasgow to Androssan was considerably less than the local rate charged by the rail carrier between these two points. There had been a previous arrangement existing between Napier and the railway company by which the latter had made through rates with his vessel plying between Androssan and Belfast. The carriage of freight and passengers by this arrangement was broken off by the railway company; and then the railway company made a similar arrangement with the owners of another vessel plying between Androssan and Belfast. Napier then filed a petition, under the second section of the Railway and Canal Traffic Act of England of 1854. That section, in

<sup>1</sup> *Lehmann v. Southern Pac. Co.* 3 Inters. Com. Rep. 80.

its leading and controlling provisions, is very similar to the first clause of the third section of the Act to Regulate Commerce; in fact, the latter may be said to be a substantial re-enactment of the former with some slight changes and additions in the phraseology which in no way affect the question that was involved in Napier's case. But, as the similarity of this portion of the two sections may be more plainly seen when placed side by side, they are here set out in parallel columns:

*Act to Regulate Commerce.*

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

*English Act of 1854.*

Sec. 2. And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever.

It was unanimously held in that case that section 2 of the Railway and Canal Traffic Act, which prohibits undue and unreasonable preference or advantage being given by the railways and canal companies to particular persons, did not apply to the case of arrangements made by a railway, whose line terminates at the sea, with a steamboat owner for carrying across the sea goods and passengers brought by the railway. The doctrine as established by the Supreme Court of the United States is that the common law imposes no obligation upon railroads to enter into such contracts, in the absence of statutory regulations to the contrary, and that if the carrier contracts to carry freight or passengers beyond its own line it may determine for itself what agency it will employ.<sup>1</sup> The method of doing through business, and

<sup>1</sup>See *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Pullman Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499.

upon through bills of lading, requires ordinarily that the freight charges shall be collected at the point of destination, and the carrier might for some reasons be willing to do a credit business of that kind with one connecting line and not with another. Whether the freight is collected at the points of shipment or of destination, it involves the giving of credit and payment of balances between the connecting lines doing the through business at stated intervals, somewhat akin to a partnership. And a rail carrier might, for reasons satisfactory to it, be willing to make such an arrangement with one connecting line and not with another. Besides, there are certain responsibilities which the initial carrier assumes in regard to the transportation of property beyond its line, and it might very properly decline to assume that risk unless it was permitted to select, as an agency, the connecting line upon which it would do the service.

The last clause of section 3 of the Act to Regulate Commerce does not prevent such selection. The common carriers named and referred to in that clause are such alone as are subject to the provisions of the statute. In the first place, this clause requires of such common carriers the performance of duties that, in their very nature, are reciprocal and valuable to each other as well as to the public. Congress has not undertaken in this statute to require of any other than common carriers, engaged in the transportation of interstate commerce in the manner described in the Act, the performance of any duties whatever. In the absence of express language to that effect it cannot be inferred that Congress intended to require a common carrier engaged in interstate commerce to extend the valuable aid and facilities enumerated in this clause to another common carrier, operating a connecting line, which is not subject to the provisions of the statute, and which cannot be required to make any return whatever on its part in the shape of similar service and facilities to the interstate carrier from which it has received these benefits. To construe this clause as embracing independent water lines would be to make such water lines subject in some important respects to the provisions of the statute, a result that would be manifestly at variance with all the other provisions of the statute. In the

next place, the words "tracks and terminal facilities," in the connection in which they are used in this clause, evidently refer to a rail carrier, either an all rail carrier, or a carrier part rail and part water, but not to an independent water line. And lastly, the discrimination in rates and charges forbidden by it has no application to an arrangement for through rates and through billing made by a common carrier subject to the provisions of this statute with one connecting line for the transportation of interstate commerce, and declining to do so with another connecting line, when each of these connecting lines is an independent water line and neither of them as such is subject to the provisions of the Act to Regulate Commerce. Where several rail carriers engaged in interstate commerce each cross or touch a navigable river, leaving a large space of territory along and near the river and between their lines that can be served only by steamboats, and in connection with steamboats these rail carriers carry freight to and receive it from this territory at points where they touch or cross the river respectively, they may make through rates with only one line of steamboats, and refuse to make such through rates with other steamboats, on the river; and this is not unjust discrimination or unlawful preference. In such a case all that a steamboat has a right to demand, with which the rail carriers have refused to make through rates and to do through billing, is that the rail carriers shall receive from and deliver to such steamboat freight for transportation at their published local tariff rates.<sup>1</sup>

In *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 57, where a railroad discriminated against one of two rival lines of steamboats by charging it fifty cents a hundred more for freight than the other, it was corrected. Carriers of interstate traffic are not obliged to pay charges of steamboat lines when no agreement for a through rate exists.<sup>2</sup> The Interstate Commerce Commission cannot compel a rail carrier to receive freight from or deliver it to a steamboat with which it has refused

<sup>1</sup> *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

<sup>2</sup> *Re Clark*, 2 Inters. Com. Rep. 797.

to make a through rate and to do through billing, upon the prepayment of charges for an estimated proportion of a through rate, equal in amount to that which the rail carrier receives from a steamboat line with which it has an arrangement for through rates and through billing.<sup>1</sup> The Act to Regulate Commerce does not empower the commission to compel railroad companies to enter into joint arrangements with carriers by water for through carriage at through rates. The fact that a railroad company makes such arrangement for one of its branch roads will not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system, when it appears that from such other parts of its system it actually makes through arrangements by a more direct route and at the same rates, which are presumptively of equal convenience to shippers.<sup>2</sup>

### § 119. *Through Routes and Through Rates.*

In some cases another and very extraordinary phase of this general subject has been presented. It has been made to appear that railroad companies, when rate wars exist among themselves at certain points, consider themselves at liberty to reduce the rates at such points to any extent they please, leaving the intermediate rates unaffected. A very striking illustration of the existence of this opinion was given during August last, in the rates made from St. Louis and Kansas City to Texas points. The normal rates for a number of years from St. Louis to what are known as Texas common points have been on the first class \$1.33, falling thence to 40 cents on class E. On August 1 a reduction began to be made, and the rates, in six days, went down to 50 cents on the first class. The reduction was less on the other classes, but it was considerable on them all. The rate sheets which were issued in this period contained the notation that the reduced rates did not apply to intermediate points. Some most astonishing results followed. While 50 cents was being accepted for through transportation of first class merchandise, the St. Louis and San

<sup>1</sup> *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

<sup>2</sup> *Re Joint Water & Rail Lines*, 2 Inters. Com. Rep. 486.

Francisco Railway and the Missouri Pacific were charging, to some intermediate points, as high as \$1.10, the St. Louis, Arkansas and Texas as high as \$1.15, and the St. Louis, Kansas and Texas as high as \$1.20. The monstrous injustice of such relative charges is very obvious, and the commission immediately called upon the authorities of these roads to put their rate sheets into conformity with the law. It ought to be distinctly understood, without any monition from the public authorities, that a carrier does not, by entering upon a rate war, gain any new or additional rights or privileges under the law. The rate war itself, in its immediate or ultimate results, or both, is commonly a public mischief, and is very far from furnishing ground for special favors to the parties who engage in it. The carrier who, before taking part in such rate war, was making, as between the certain points, a lesser charge than upon shorter hauls to intermediate points, is bound, when it further reduces this lesser charge, to do so to such extent as to throw none of the burden of it upon intermediate points. Enforcing the law with this understanding of what it requires, makes the long and short haul clause tend very greatly to the maintenance of steadiness in rates, and in that respect renders it of great advantage not only to the public at large, but, to the carriers themselves. Some time since the commissioners and other authorities charged in the several states with the regulation of railroads met in convention with the Interstate Commerce Commission, to consider various subjects which were of common interest. Among the resolutions adopted was one: "That it is expedient that the laws of the several states should be in exact harmony with the provisions of the Interstate Commerce Act on the following topics: the definition and prohibition of unjust discrimination; the prohibition of undue and unreasonable preferences and advantages; the requirement of equal facilities for the interchange of traffic; the regulation of the relations between rates of compensation to be allowed for long and short hauls; the regulations as to printing and posting rates, fares and charges; the regulations as to notice to be given of advances and reductions in rates; the penalties for false billing, false classification, false weighing, etc."

In one of the annual reports of the Interstate Commerce Commission to Congress attention was called to the fact that carriers whose lines were entirely within the limits of single states, and therefore supposed themselves entirely exempt from the Act to Regulate Commerce, claimed the right to make at will such arrangements as they saw fit in respect to the interstate traffic carried over their lines, and in effect to establish discriminations therein as between connecting lines and even between persons and places. This state of things the commission thought ought not to be allowed to continue and it was strongly urged that amendment be made to the third section of the Act so as to better provide for through traffic at through rates over connecting lines. This recommendation was repeated in the next Annual Report. In the first section of the Act it is declared: "The provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement, for a continuous carriage or shipment, from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia," etc. With this proviso: "The provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property, wholly within one state," etc. In the Third Annual Report the commission discussed somewhat fully the importance of uniformity in the regulation of all the railway transportation of the country, and as a means to that end the desirability of state regulation in harmony with the provisions adopted by national authority. The reasons for this uniformity were given at some length, and it was shown how close and interdependent are relations between state and interstate transportation, and how the exercise of state authority in the regulation of state traffic by rail must necessarily to some extent embarrass the regulation of interstate traffic by Congress, unless both are in substantial harmony. In some cases, roads commonly known and considered as state roads, and which claim entire exemption from the provisions

of the Act of Congress, and refuse to join with interstate roads in making through routes and through rates, have been exercising the authority to make rates upon their own lines on an assumption that, as to interstate traffic, they were exempt as well as from state authority and state regulation. Some cases are reported in which the through rates upon interstate commerce have been made largely to exceed the sum of the local rates for like traffic carried over the same lines and between the same points. The state commission of Florida recently brought to the attention of this commission the fact that whereas the sums of the locals between a named point in Florida upon the one road and another point in Georgia on the other was a certain specified sum, when the freight carried in Florida was not interstate, the combined charges when the traffic was interstate were more than sixty per centum greater. This discrepancy resulted apparently from an attempt on the part of one of the roads to compel the delivery of the interstate traffic to it at a certain junction point, which would secure to it a longer transportation on its own line than if it were delivered elsewhere, the charge if it were delivered elsewhere being increased by an arbitrary rate which made it greater than the charge on state traffic. Some of the resulting burdens upon interstate traffic, where compared with those upon state traffic, were relatively even more excessive than in the case above instanced.

Where excessive rates are thus found to exist they may appear upon investigation to have been imposed arbitrarily and with no other thought than to take advantage of the situation to obtain the highest possible remuneration for the particular service. Very often, however, they are to be traced to unfriendly relations between connecting roads, which lead to a failure to come to agreement upon rates for transportation from points on the one line to points on or beyond the other, and upon a division of such rates between them. The excessive rates which, in such cases, one road imposes are quite as likely to be designed to divert traffic from or otherwise embarrass the other as to have any other purpose. It cannot, for a moment, be conceded that there is any commerce by rail which is not subject to either state or Federal authority under



existing laws. A state road may not be compellable, under the Federal law as it now stands, to unite with other roads in through tariffs upon interstate traffic, and may claim with some plausibility that it is not compellable to carry persons or property over its line otherwise than as a state road at state rates. If, however, it persists in asserting exemption from Federal law, and in declining to make rates upon interstate traffic as such, it thereby asserts, in the most practical and emphatic manner, that all its traffic is state traffic, and has no excuse whatever for imposing upon any part thereof rates which exceed what the state law permits, or what the road itself consents to accept for like service upon other like traffic. The very claim it makes to being exclusively a state road estops it from making such impositions. There can be no more right to discriminate in charges against a portion of the traffic carried because of the shipper having directed its transportation into another state by some other agency, than there would be to make like discrimination on grounds personal to the shipper himself. The commission states its opinion, however, that whenever the state road gives, receives or acts upon through shipping bills, for the transportation of interstate traffic over its line or even receives and carries such traffic for delivery to another carrier, when its destination is distinctly made known and is a point beyond the state boundary, it thereby, as a carrier of interstate traffic, becomes subject to the Act to Regulate Commerce, not only as to making and observing of rates, but as to the filing of rate sheets also.

The commission admit that a construction of the Act to the effect here stated would render obligatory the filing of rate sheets and reporting to the commission by nearly or quite every railroad in the country; but it insists that the inconvenience in this to any one road would be insignificant when compared with the benefit to the public. At the same time it recognizes that obedience to the law regarding interstate traffic ought not at all to interfere with any proper regulation of that which is legitimately state traffic by state authority. Mischief would only arise when the state law was found to be so far variant from the Federal law that the enforcement of the former would tend to preclude proper regulation under the latter. But it is suggested that the possibil-

ity of this will be prevented by state laws being made harmonious with Federal law. The power to require through routes and rates for through traffic is not alone important where one or more of the roads assume to be state roads exclusively, for it is sometimes found that a carrier which operates a great system of roads, in order to annoy or injure a rival, will refuse to give any but long, circuitous and perhaps expensive routes for some portions of its traffic when direct routes would be perfectly feasible, and very much more to the convenience and interest of shippers and the general public. The power to cast upon the public the consequences of rivalries and contentions between carriers who owe their existence to public authorization and who are nominally created for the public benefit, cannot perhaps be wholly taken away or precluded by any possible legislation; but it ought to be restricted within the narrowest limits which shall be found practicable, and no restraint which could be imposed upon it could be subject to less exception than that which would compel the making of reasonable through routes for through traffic as between connecting roads. Some objection has been made on the part of carriers to the granting of authority for this purpose, on the ground of the possible abuse, and also that the carriers themselves will be impelled by their own interest to make all such arrangements as shall be really needful. The first objection is easily raised to the grant of any new governmental power, and unless supported by very forcible reasons may well be treated as merely formal and perfunctory; the second is already conclusively demonstrated by the experience of the country to be unfounded. The cases in which actual inconvenience and injustice are caused to the business public through the unfriendly action of rival carriers in the refusal to give proper accommodations by through routes and through rates are numerous, and sometimes not only annoying but very injurious. It ought not to be in the power of the carriers to perpetuate this injustice.<sup>1</sup>

No power exists at common law, and none is given by the Act to Regulate Commerce, to compel connecting railroad companies

<sup>1</sup> *4th Annual Report of Interstate Commerce Commission*, 3 Inters. Com. Rep. 337.

to unite in a joint tariff, or to enter into a through rate arrangement for transportation, unless they desire to do so. They cannot be compelled to abandon the full control of their separate roads; and neither of them is bound to adjust its own local tariff to suit the other.<sup>1</sup> A court of equity has no power under the Interstate Commerce Act to compel a receiving company which has made a contract or agreement with another connecting and competing company to establish the same rate, as against the receiving company, at the instance of a railway company with which there is no contract, and compel the receiving company to accept that rate, as no power is conferred by the Act upon any tribunal to provide for the necessary divisions growing out of a through routing and a through rating.<sup>2</sup> The commission is not invested with authority to establish through routes, nor to fix through rates, between connecting lines. The English Act of 1873, amendatory of the Act of 1854, did confer such authority upon the English Commission; but our Act to Regulate Commerce contains no such provision, and confers no such authority.<sup>3</sup> Through rates and through billing are matters of agreement among carriers engaged in interstate commerce, and, as was decided in the case of *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 2 Inters. Com. Rep. 454, the commission has no power under the statute to compel them against their consent to enter into arrangements for through rates and for through billing.<sup>4</sup> Arrangements in respect to through freight traffic, and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangements. Such arrangements, which usually include the reciprocal

<sup>1</sup> *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. Rep. 912; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 389, 2 L. R. A. 325, 37 Fed. Rep. 630; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 765, 41 Fed. Rep. 563; *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332.

<sup>2</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 59 Fed. Rep. 400.

<sup>3</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

<sup>4</sup> *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial, and injurious to the interest of one, or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under, and by virtue of, private contract or arrangement. At common law, the refusal of a common carrier to make through traffic arrangements, at, or upon joint through rates, with one connecting railroad company, such as it makes, or enters into, with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities. Section 5258 of the U. S. Rev. Stat. (embracing the Act of June 15, 1866) imposes no duty; it merely permits, or authorizes the carriage of traffic from one state to another, and to that end, the formation of continuous lines, by mutual agreement. It confers no power to compel a railroad company to make through routes and through rates with one connecting line, because it has, by agreement, made them with another.<sup>1</sup>

It is clear that from the provisions of section six of the Act, two or more common carriers may lawfully enter into contracts or agreements for the establishment of through routes at or upon joint through rates, because copies of such contracts and agreements, and of the joint tariffs of such carriers, are required to be filed with the commission. If, in the exercise of the right, thus impliedly, if not expressly recognized, a common carrier, by private arrangements forms a through route, and establishes joint through rates, with certain connecting lines, it cannot be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation. The Act does not undertake to create between connecting lines such an *agency* or "*quasi*" *partnership relation*, as is necessarily involved in agreements, or arrangements, for the establishment of through routes, and the making of through

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 39 Fed. Rep. 567.

rates ; as such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier the duty, or obligation, to make the same or like contracts with all other lines. No authority is conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading of property, at through rates, over connecting lines, in the absence of such arrangements between the companies. An individual shipper, or consignor, cannot legally require a railroad company, to send a shipment by a particular route, beyond the company's line, at the same, or equivalent through rates, which such company may have established with other connecting lines ; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such commerce may not lawfully require of connecting lines. In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination ; and in doing so, no discrimination is made against the other company, on the traffic it carries. Nor does the company, charging local rates on such freights, make, or give, any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through routing, and at through joint rates which may be lower than its local rates to the same points ; because the service in the two cases is not the same, or identical.<sup>1</sup>

An aggregate through rate is itself an entirety, although made up of agreed percentages, proportions or divisions, as the case may be, of the entire rate among the several carriers ; and where the rail carrier makes a through rate from a point on a navigable river with a steamboat line, and refuses to make such through rate with another steamboat, the commission cannot compel the rail carrier to receive freight from or deliver it to the steamboat, with which it has refused to make a through rate and to do through billing, upon the prepayment of charges for an estimated proportion of

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567.

the through rate equal in amount to that which the rail carrier receives from the steamboat line with which it has an arrangement for through rates and through billing.<sup>1</sup> Contracts with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate section 7 of the Act to Regulate Commerce, prohibiting a combination to prevent the carriage of freights from being continuous.<sup>2</sup> An agreement of a transcontinental association to promote harmony of action between carriers and the maintenance of joint rates, with a proper division of through rates, is not on its face unlawful.<sup>3</sup> The only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard the current ocean rates.<sup>4</sup> The Interstate Commerce Law does not apply in case of a shipment from one state to another, where the several lines over which the freight passes have not established a joint tariff of rates so as to subject them to the penalties imposed by the law for its violation.<sup>5</sup> The regulation of the transportation of foreign merchandise from a port of entry to a place within the United States, upon a through bill of lading, does not extend to the control of rates made in the foreign port for its carriage to the port of entry of the United States or to a foreign country adjacent.<sup>6</sup>

Traffic is either state or interstate traffic according to its origin and destination. It is shipped by the consignor in the state where the consignee dwells, or it is not. If not, it is interstate traffic, and when carried over two or more lines, it is, by the fact of having been received, forwarded, and delivered as one through shipment, transported under a common control, management or

<sup>1</sup> *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

<sup>2</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567.

<sup>3</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>4</sup> *New York Produce Exch. v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 553.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Nelson*, 5 Tex. Civ. App. 387.

<sup>6</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

arrangement, as the case may be, for continuous carriage or shipment. The phrase "common control, management or arrangement for continuous carriage or shipment" in the first section was intended to cover all interstate traffic carried through over all rail, or part water and part rail lines. The "arrangement" for continuous carriage or shipment is complete whenever the carriers have arranged for delivering and receiving through traffic to and from each other and such an arrangement is necessarily "common." This construction of the words "common arrangement" as used in the first section of the law is in line with decisions in *Boston Fruit & P. Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 493, and *Mattingly v. Pennsylvania Co.* 2 Inters. Com. Rep. 806, and with other rulings of the commission. The words "common control, management, or arrangement," apply to a case where the initial carrier furnishes the shipper with a car specially fitted up for his business, which is taken over connecting roads on special through time tables.<sup>1</sup> The receipt successively by two or more carriers for transportation of traffic shipped under through bills for continuous carriage over their lines is assent to a common arrangement for such continuous carriage or shipment and previous formal arrangement between them is not necessary to bring such transportation under the terms of the law.<sup>2</sup>

The 1st section of the Act to Regulate Commerce provides that it "shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water *where both are used under a common control, management, or arrangement, for a continuous carriage or shipment, etc.*" The Georgia Railroad extends from Atlanta to Augusta. The Georgia Railroad Co. requested its connections, that in issuing bills of lading to its local stations, no rates be inserted east of Atlanta. There is no agreement on the part of said company for any such joint tariff, as implies a reduced rate from Cincinnati, Ohio, to its local stations. On the contrary, that company collects and retains its entire local

<sup>1</sup> *Boston Fruit & P. Exch. v. New York & N. E. R. Co.* 3 Inters. Com. Rep. 493, 604.

<sup>2</sup> *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 120.

rates on all freight shipped from Cincinnati to its local stations. The Interstate Commerce Commission held that there is no such "arrangement for a continuous carriage or shipment" existing between said company and its connections, as to bring the rates which are charged to said local stations, within the first section of the Act to Regulate Commerce. When goods are shipped through from Cincinnati, Ohio, to local stations on the Georgia Railroad, the initial carrier at Cincinnati issues through bills of lading, and quotes through rates. Said rates, however, are arrived at by adding to the rates from Cincinnati to Atlanta, the full local rates of the Georgia Railroad from Atlanta to said local stations. The Georgia R. Co. receives the goods at Atlanta, and transports them continuously to its local stations; but it demands and collects its full local rates from Atlanta to said local stations. The Interstate Commerce Commission held that the mere reception, and continuous transportation, by the Georgia R. Co., of freight which comes to it over other lines of railroads, destined to its local stations, for which the initial carrier has issued through bills of lading, and quoted through rates, does not constitute such an "arrangement" as is contemplated by the first section of the Act to Regulate Commerce, where the through rates, so quoted, allow to that company its full local rates.<sup>1</sup>

In several of these cases the through charge to intermediate stations is made by the addition of the terminal carrier's local rate to the through rate in effect to a point on its line. This practice has been disapproved of by the commission in other cases.<sup>2</sup> The addition of a local rate to a reasonable through rate in order to fix the through charge to the local station is liable to produce a relatively unreasonable rate to that station. The difference in situation of the basing and local points in respect of through traffic is not properly measured by the local rate for carriage between them. The reasonableness of the added local, *as a local rate*, is not under consideration in a case where the rate

<sup>1</sup> *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332; *Chicago & N. W. R. Co. v. Osborne*, 4 Inters. Com. Rep. 257, 10 U. S. App. 430, 52 Fed. Rep. 912.

<sup>2</sup> *Re Atlanta & W. R. Co.* 2 Inters. Com. Rep. 461; *Hamilton v. Chattanooga, R. & C. R. Co.* 3 Inters. Com. Rep. 482.



complained of is the total charge over different lines. The total rate or charge for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate or charge is made is only material as bearing upon the legality of the aggregate charge, and how any reduction ordered may be accomplished, whether by lowering locals or proportions, is a matter for the carriers to determine among themselves. The rate over through connecting lines is correctly adjusted upon the distance through, and not upon the shorter distances over the several lines.<sup>1</sup> Through and continuous lines imply through rates which must be reasonable rates.<sup>2</sup> Where two or more roads forming a continuous connecting line between points in different states bill and carry interstate traffic through to certain stations on the last road forming such line, neither the roads together nor any one of them can evade the obligations of the Act to Regulate Commerce by declaring that as to such traffic destined to such stations on such terminal road it is a local carrier.<sup>3</sup>

Railroad companies making through and continuous lines cannot rid themselves of the responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their line.<sup>4</sup> The carriage of freights cannot be prevented from being treated as one continuous carriage from the place of shipment to the place of destination, by any means or devices intended to evade any of the provisions of the Act.<sup>5</sup> If a united rate, substantiated by a through bill of lading, from the point of shipping to destination, has every essential constituent of a through rate, it is not material that it should be formally announced by one of the carriers to another who is engaged in the making of it, in order to constitute it a through

<sup>1</sup> *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

<sup>2</sup> *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78.

<sup>3</sup> *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682; *Trammell v. Clyde SS. Co.* 4 Inters. Com. Rep. 139.

<sup>4</sup> *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78; *Board of Trade of Troy v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 348.

<sup>5</sup> *Re Grand Trunk R. Co.* 2 Inters. Com. Rep. 496.

rate. Words are not conclusive in any such contract. The law is determined by the substantial facts. A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a waybill showing the route over which it is to pass, with the percentages of all the other lines set forth in the waybill, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages. Where a rate is in itself a through rate, and made up of percentages to an intermediate point on a long haul, the circumstances and conditions of transportation must be rarely exceptional indeed to be of such controlling force as to warrant any considerable excess of such rate in amount over a percentage of a through rate for an equal distance along the same line, by way of the same point, to a more distant point. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination.<sup>1</sup> One carrier's proportion in a through rate upon a long haul may be considerably less than its local rate for the same freight over its own line, without constituting unjust discrimination, unlawful preference, or extortion.<sup>2</sup> Such a situation only becomes illegal when it can be shown that illegal results follow from it.<sup>3</sup> A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination. The gross charge for a continuous carriage, whether it be formed by combining local rates along the entire line of road, or based on a percentage on a part of the local rates, or on the combined locals, must not ordinarily be permitted to exceed a like percentage of charge over the through rate, for a particular portion of the same line, including in its limit the same locality, to a more extended location.

<sup>1</sup> *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.* 2 Inters. Com. Rep. 393.

<sup>2</sup> *New Orleans Cotton Exch. v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 777.

<sup>3</sup> *La Cross Manufacturers & J. Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 9; *Business Men's Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

Property billed from one station to another, with the understanding that it is to be unloaded at an intermediate station, and that whether it shall be reloaded for further carriage will depend upon the volition of the shipper or of any one who may have become purchaser, does not fall within the reasons governing rates on through transportation; and the carrier is not, at such intermediate points, entitled to have the carriage protected as a through shipment as against competitors.<sup>1</sup> A railway company is under special obligation to give reasonable rates for its local business; but there are many influences which may affect through rates while not bearing upon local rates at all, or, if at all, in less degree. Through rates are not necessarily illegal which, when divided between carriers, give them less than their local rates, provided that the through rate itself is not less than some one of the locals, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed.<sup>2</sup> A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a waybill showing the route over which it is to pass, with the percentages of all the other lines set forth on the waybill, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages.<sup>3</sup> When a combined rate evidenced by a through bill of lading from the point of origin to destination has every substantial constituent of a through rate, it is not necessary that it should be formally "quoted" by one of the carriers to another who is engaged in the making of it, in order to constitute it a through rate. Names are nothing in such a transaction; the law looks at the elements and substance of the transaction itself.<sup>4</sup> Carriers should not treat shipments of traffic intended to be continuous between interstate points as consisting of two kinds of service in.

<sup>1</sup> *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co.* 2 Inters. Com. Rep. 721.

<sup>2</sup> *Lippman v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 414.

<sup>3</sup> *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.* 2 Inters. Com. Rep. 393.

<sup>4</sup> *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co. supra*; *Board of Trade of Troy v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 348.

dependent of each other, the one to or from a so-called basing or competitive point on a through rate, and the other between the basing or competitive point and a so-called local or intermediate point on a local rate.<sup>1</sup> Where freight passes over a continuous line or route operated by more than one company, on which no joint tariff of rates or charges has been established, the tariff of rates or charges is the sum of the established local rates or charges of the several companies operating such continuous line.<sup>2</sup> Unlawful discrimination is not established by proof that a rate of freight on cotton from Vicksburg, Mississippi, to eastern points, given to one, is different from that given to another, when it also appears that such rate is only a part of a uniform through rate from a point beyond.<sup>3</sup>

It was not intended by the Act to Regulate Commerce, that produce should not on its way to a point where it is to be prepared for market be charged local rates, provided that after such preparation, it is forwarded to its less distant destination, at a rate which, added to the original local rate, equals the charge between origin and destination. Where a complaint is made against the reasonableness of through rates agreed upon by several competing lines, it is necessary to make all of such connecting lines parties defendant.<sup>4</sup> Unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, by a carrier, involves the question whether the service was rendered under substantially similar circumstances and conditions. More traffic furnished by one than the other does not render them dissimilar; and it is for the jury to say whether a difference of 12 cents per 100 pounds between a local rate of a carrier and its proportion of a through rate including another road was unreasonable.<sup>5</sup> The Act to Regulate Commerce, §§ 2, 3, are not violated by charging a local rate from a more distant point on cotton to Vicksburg, Mississippi, when after pressing there, it is forwarded to its point

<sup>1</sup> *Perry v. Florida Cent. & P. R. Co.* 3 Inters. Com. Rep. 740.

<sup>2</sup> *Lehmann v. Texas & P. R. Co.* 3 Inters. Com. Rep. 706.

<sup>3</sup> *Cowen v. Bond*, 2 Inters. Com. Rep. 542.

<sup>4</sup> *Michigan Congress Water Co. v. Chicago & G. T. Co.* 2 Inters. Com. Rep. 428.

<sup>5</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 540.

of destination at less than Vicksburg rate to such point, the total of such two rates being made to equal the regular rate from such initial point to such destination.<sup>1</sup> A cost that ought to make the through rate to a particular station, is not one caused by the delay in unloading cars at that point.<sup>2</sup> A local rate which presumably is adopted as covering both the initial and final expense of a local haul is *prima facie* excessive as part of a through rate over a through line composed of two or more carriers.<sup>3</sup> Taking the through rate to recognized "basing points," and adding thereto that local rate which will give the lowest combination, is not a proper method of determining a rate, as it treats continuous traffic as consisting of two kinds of service.<sup>4</sup> Divisions of a through rate need not be considered on the question of the way in which the through rate is affected by an arbitrary differential.<sup>5</sup> The division among themselves which a number of connecting carriers make of a through rate should not affect the question of the reasonableness or unreasonableness of the rate as an entirety.<sup>6</sup>

The owner of a branch railway communicating with the defendants' line, who collected and loaded goods upon trucks, and then handed over such trucks to the defendants at the junction with their line, and who also received from the defendants at the junction traffic for delivery at the other end of the line, is "a person interested," within the meaning of the English Regulation of Railways Act 1873, § 14, and entitled to an order requiring the defendants to distinguish in such books as they were by statute required to keep, showing the rate charged for traffic from that station, and how much of the rate is for each of the charges which together make up the gross rate.<sup>7</sup> Joint rates on long hauls usu-

<sup>1</sup> *Cowan v. Bond*, 2 Inters. Com. Rep. 542.

<sup>2</sup> *Belfast Cent. R. Co. v. Great Northern R. Co.* 4 Railway Comrs. Rep. 159.

<sup>3</sup> *Board of Trade of Troy v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 348.

<sup>4</sup> *Hamilton v. Chattanooga, R. & C. R. Co.* 3 Inters. Com. Rep. 482.

<sup>5</sup> *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 830.

<sup>6</sup> *Florida Fruit Exch. v. Savannah, F. & W. R. Co.* 4 Inters. Com. Rep. 400.

<sup>7</sup> *Tomlinson v. London & N. W. R. Co.* 8 Ry. & Corp. L. J. 328.

ally are, and should be, proportionately lower than local rates on short hauls.'

### § 120. *Combinations between Rival Carriers.*

The Interstate Commerce Act was not designed to prevent competition between different roads, or to interfere with the customary arrangement made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the road.<sup>2</sup> An agreement for the pooling of traffic between a carrier by rail, subject to the Act to Regulate Commerce, and a carrier by pipe line does not fall within the description of contracts prohibited by section 5 of that Act.<sup>3</sup> Neither of two rival corporations can enter into a contract which courts will recognize as valid for exclusive rights in territory. Neither could altogether exclude the other from particular premises, or prevent land not already appropriated or shown to be required for its own corporate use from being taken or acquired in any lawful way by another corporation for a use which is recognized as public. Such contracts are against public policy, and void.<sup>4</sup> In *Kettle River R. Co. v. Eastern R. Co.* 6 L. R. A. 211, 41 Minn. 461, it was insisted that the proposed branch lines to certain quarries, which are the property of private owners, are for the accommodation of private interests only, and not for a public use, and hence that the power of eminent domain cannot be exercised; and that the contract must be deemed to relate to private interests only, and is not, therefore, subject to this obligation. But these corporations it is said, are each quasi public corporations, and are, under their

<sup>1</sup> *Farrar v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 764. See notes to *Cleveland, C. C. & I. R. Co. v. Closser* 126 Ind. 348, 3 Inters. Com. Rep. 387, 9 L. R. A. 754; *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 2 Inters. Com. Rep. 522, 3 L. R. A. 661; *United States v. Tozer* (Mo.) 2 Inters. Com. Rep. 422, 2 L. R. A. 444.

<sup>2</sup> *Interstate Commerce Com. v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92.

<sup>3</sup> *Independent Refiners Asso. v. Western New York & P. R. Co.* 4 Inters. Com. Rep. 162.

<sup>4</sup> *Greenhood*, Pub. Pol. 672, and cases cited; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 626.

charters, authorized to exercise the right of eminent domain; and the question whether the use is public or private does not depend upon the amount of business, or the number of persons who have occasion to use either road, but upon the right of the public to require the corporations to carry their freight.<sup>1</sup> If all the people have a right to use the road, it is a public use or interest, though the number who have business requiring its use may be small.<sup>2</sup> The cases cited fully illustrate and support the principle, and of its correctness there can be no doubt. Two railroad companies having each a through and separate line of communication between two given points are competing companies for all traffic between such points.<sup>3</sup> The mere fact that a railroad company is not parallel with another does not deprive it of the character of a competing line, where it is competing by reasons of its relations to other roads.<sup>4</sup>

Judicial notice may be taken by the court of the fact that two railroads touching the same point are parallel and competing lines.<sup>5</sup> An agreement between several railroad companies in Texas, some of which owned and controlled competing lines, for the appointment of a common governing committee, or an association (composed of one member from each company) to fix the rates for which freights should be carried to and from points within the state, was held illegal because contrary to article 10, § 5, of the constitution, which provides that "no railroad . . . or managers of any railroad corporation shall consolidate the stock, property or franchise of such corporation with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line." The language of this provision of the state constitution evinces that control in any manner and to any extent

<sup>1</sup> *State v. Hibernia Underground R. Co.*, 47 N. J. L. 47.

<sup>2</sup> *Phillips v. Watson*, 63 Iowa, 33; *Clarke v. Blackmar*, 47 N. Y. 156; *Lewis*, Em. Dom. § 166.

<sup>3</sup> *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970, 137 U. S. 48, 34 L. ed. 614.

<sup>4</sup> *East Line & R. R. Co. v. State*, 75 Tex. 434.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. State*, 2 Inters. Com. Rep. 335, 1 L. R. A. 849, 72 Tex. 404; *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

was intended to be prohibited—provided it was such as is calculated to enable one railroad, by means of a contract or agreement for interference in the other's affairs, to keep down competition between them. Even in the absence of such constitutional provision,—*quære*, whether action under the agreement could not be enjoined as being in restraint of competition and contrary to public policy. Such agreement is not relieved from illegality by the fact that any company party to the agreement has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, or that it has not been shown that the companies have made charges in excess of the limits allowed by law. The state has the right to prohibit and interfere with a contract in restraint of competition, some of the parties to which are corporations created by the state, although it regulates charges upon freight carried to and fro between other states. The agreement, being illegal as to some, is illegal as to all.<sup>1</sup>

A contract between corporations charged with a public duty, such as is that of common carriers, providing for the formation of a combination having no other purpose than that of stifling competition and providing means to accomplish that object, is illegal. Combinations are illegal at common law, because contrary to public policy. Agreements for such combinations and promises founded thereon will not be enforced,<sup>2</sup> and the carrying out of the combinations will be enjoined.<sup>3</sup> The purpose to break down competition poisons the whole contract, for a combination of rival carriers moved and controlled by that purpose alone, is destructive of public interest and to the last degree antagonistic to sound public policy. The principle on which this rule rests is a very old one and its place in the law is very firm. The overshadowing element is the purpose which influences the parties in

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. State*, 2 Inters. Com. Rep. 335, 1 L. R. A. 849, 72 Tex. 404.

<sup>2</sup> *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282; *Sayre v. Louisville Union Benev. Asso.* 1 Duv. 143, 85 Am. Dec. 613; *Morgan v. Donovan*, 58 Ala. 241; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411; *State v. Hartford & N. H. R. Co.* 29 Conn. 538.

<sup>3</sup> *Central R. Co. v. Collins*, 40 Ga. 582; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5.



uniting themselves in a combination and concerting means to make its purpose effective; for the law abhors a combination which has for its principal object the suppression of competition in matters of commerce in which the public have an interest. If the constitution, statutes or public policy of the state forbid the company from entering into combinations to prevent competition, the act of the company in entering into such a combination is *ultra vires*, even though the combination involves interstate traffic; and the state courts have jurisdiction to enjoin the act or to forfeit the charter of the company therefor.<sup>1</sup> Among the early cases establishing and enforcing the general principle are those wherein it is held that an agreement to prevent or hinder competition at public sales is void.<sup>2</sup> "No one," said the court, in *Hunter v. Pfeiffer*, *supra*, "can predicate an enforceable right upon such an agreement."<sup>3</sup> Relevant and striking illustrations of the scope and force of the general principle are supplied by what are known as "*The Sugar Trust Cases*," decided by the courts of New York—cases rich in argument and authority.<sup>4</sup> The authorities collected in those cases demonstrate the proposition

<sup>1</sup> *Tippecanoe County Comrs. v. Lafayette, M. & B. R. Co.* 50 Ind. 85 (competitive traffic between Lafayette, Ind. and points in Ill.); *State v. Vanderbilt*, 37 Ohio St. 590 (competitive traffic between Cincinnati, Ohio, and points outside Ohio reached through ports on Lake Erie); *Pennsylvania R. Co. v. Com.* (Pa.) 4 Cent. Rep. 495 (competitive traffic between Pittsburgh and points reached through New York City); *State v. Atchison & N. R. Co.* 24 Neb. 143, 32 Am. & Eng. R. Cas. 388 (competitive traffic between Lincoln, Neb., and points in Kansas); *Thouren v. East Tennessee, V. & G. R. Co.* (Tenn. Ch.) 5 Ry. & Corp. L. J. 77 (competitive traffic between points in Tennessee and points in adjoining states). See also *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411 (competitive traffic between New Haven, Conn., and points in Massachusetts); *Morgan v. Donovan*, 58 Ala. 241 (competitive traffic between Mobile, Ala. and New Orleans, La.). As to foreign commerce, see *Murray v. Vanderbilt*, 39 Barb. 140.

<sup>2</sup> *Hunter v. Pfeiffer*, 108 Ind. 197; *Jennings County Comrs. v. Verbar*, 63 Ind. 107; *Maguire v. Smock*, 42 Ind. 1; *Gilbert v. Carter*, 10 Ind. 16, 68 Am. Dec. 655; *Forelanders v. Hicks*, 6 Ind. 448; *Plaster v. Burger*, 5 Ind. 232; *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226.

<sup>3</sup> In support of this statement the court cited *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *Woodworth v. Bennett*, 43 N. Y. 273, 3 Am. Rep. 706; *Gibbs v. Smith*, 115 Mass. 592; *Hannah v. Fife*, 27 Mich. 172.

<sup>4</sup> *People v. North River Sugar Ref. Co.* 2 L. R. A. 33, 54 Hun, 355, note, affirmed in 9 L. R. A. 33, 121 N. Y. 582. See also *Law Literature of Trust Combinations, Monopolies, etc.* 23 Abb. N. C. 317.

that a trust or combination, having for its purpose the suppression of free competition, cannot live where the common law prevails.

In *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, competing canal companies combined and agreed to fix an established rate of freight and to divide profits. The agreement was adjudged illegal, the court saying, among other things, that "it is a general proposition that an agreement to do an unlawful act cannot be supported at law—that no right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy." A combination between common carriers to prevent competition is at least *prima facie* illegal. Where several common carriers combine as an association, the object of which is to reduce competition between them, and to provide a uniform charge for carriage, and fix upon such a rate, each member to pay a fine for carrying freight for less than the same, the agreement is void, and the association cannot recover the fine.<sup>1</sup> The doubt is as to whether any ultimate purpose can save it from the condemnation of the law; there can be no doubt that, unexplained, such a combination for such a purpose is condemned by public policy. If such a combination can in any event be admitted to be legal it can only be so where it is affirmatively shown that its object was to prevent ruinous competition and that it does not establish unreasonable rates, unjust discriminations or oppressive regulations. If such a contract can stand it must be upon an affirmative showing, and one so full, complete and clear as to remove the presumption (to which its existence of itself gives rise) that it was formed to do mischief to the public by repressing fair competition. The burden is on the carrier to remove the presumption, and until it is removed the agreement providing for the combination gives way before this presumption and the agreement must be held to be within the condemnation directed against all contracts which violate public policy.<sup>2</sup>

It had long been the custom of a common carrier of goods to

<sup>1</sup> *Sayre v. Louisville Union Benev. Asso.* 1 Duval, 143, 85 Am. Dec. 613.

<sup>2</sup> *Cleveland, C. C. & I. R. Co. v. Clossen*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

make contracts for carrying grain to the eastern cities, and in its regular way of business it entered into a contract with a shipper of grain whereby it undertook to transport grain from a station on its road to a shipping point to which other lines also carried grain. At the time this contract was made there was no open and established rate of freight charges for carrying such grain, except a certain rate agreed upon between the defendant and other railway companies owning competing lines; the rate so fixed by the competing companies was established by an agreement made by them for the purpose of preventing competition; and was enforced and maintained, in so far as it was enforced and maintained by an agency of such companies established for that purpose, and called a "pool." This pool was managed by a person selected by the companies for that purpose and called a "pool commissioner." At the time mentioned all the railway companies that were so located or situated as to be competitors for such freight were parties to said arrangement and pool. The rate established by the combination of common carriers was  $21\frac{1}{2}$  cents per hundred weight. The defendant, notwithstanding such combination and pool, offered and gave to the shipper an inducement for shipping freight over its line at a rate lower than that fixed by the combination and pool; but in order to do this and be able to report to the pool commissioner that such pool rate had been charged, the defendant requested the shipper when shipping freight over its lines, to pay the pool rate, and agreed at the same time, with him, to pay a certain portion of the pool rate so charged, as a rebate, in order that the shippers might in the end be only required to pay the rate fixed by the carrier, and in this manner and for this purpose the defendant did, on the same day, agree with the shipper, in respect to the shipment of grain, that he should pay the pool rate of  $21\frac{1}{2}$  cents per hundred weight and that the carrier would thereupon repay to him  $4\frac{1}{2}$  cents on every hundred weight of grain so shipped, as a rebate, so that he should, in the end, pay as freight upon such shipment but 17 cents per hundred weight, which was then, in fact, the rate of the carrier, for such freight, between such points as then agreed upon, which rebate the defendant agreed to pay promptly after such ship-

ment. The contract between the railroad companies was held to be void as an illegal combination between competing carriers.<sup>1</sup> The authorities found on every hand not only fully support the conclusion that a contract between competing carriers, forming a combination for the purpose of stifling competition, is *prima facie* illegal; but many of them carry the principle to a much greater length.<sup>2</sup> But contracts between railroad companies to endeavor to promote each other's interest by mutual influence in business and delivering freights and passengers, are not void as against public policy, in favor of the party who has received benefit under the contract.<sup>3</sup>

Shipowners who combine together for the purpose of securing exclusively for themselves a carrying trade at profitable rates, and send ships to a port to which other owners have sent ships, and underbid them, reducing freights so low as to prevent their getting remunerative rates, threaten to dismiss certain agents if they load such owners' ships, and circulate a notice that a rebate allowed persons who ship exclusively by their vessels will not be allowed to those who ship by the other vessels,—are not guilty of any conspiracy which will make them liable to such other owners.<sup>4</sup> But the acquisition and consolidation by a rail carrier, under one system of management, of different competing lines of road serving the same territory in the carriage of competitive traffic to the same markets, cannot create a right to deprive the public of fair competition, or warrant oppressive discrimination to equalize profits by making rates for one division that give profitable mar-

<sup>1</sup> *Texas & P. R. Co. v. Southern Pac. R. Co.* 41 La. Ann. 970; *Cleveland, C. C. & I. R. Co. v. Closser, in fra.* And in support of its ruling referred to the cases of *Gibbs v. Consolidated Gas Co.* 130 U. S. 408, 32 L. ed. 984; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 644, 32 L. ed. 819; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Morrill v. Boston & M. R. Co.* 55 N. H. 537; *Jackson v. McLean*, 36 Fed. Rep. 213; *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387; *Firemen's Charitable Asso. v. Berghaus*, 13 La. Ann. 209; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Glasscock v. Wells*, 23 La. Ann. 517, and *Cummings v. Saux*, 30 La. Ann. 207.

<sup>2</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

<sup>3</sup> *Tonawanda Valley & C. R. Co. v. New York, L. E. & W. R. Co.* 42 Hun, 496.

<sup>4</sup> *Mogul SS. Co. v. McGregor* [1892] 1 App. Cas. 25.

kets to a portion of its patrons, and higher rates and charges for another division that are destructive to the pursuits of other patrons who are competitors in the same business.<sup>1</sup>

In *Manchester & Lawrence R. Co. v. Concord R. Co.* 3 Inters. Com. Rep. 319, 9 L. R. A. 689, 66 N. H. —, the proceeding is a bill in equity for a discovery and an accounting of the defendant's dealing with the plaintiff's railroad properties from December 1, 1856, to July 1, 1887, under various contracts and leases; for the delivery of certain books, records and papers alleged to belong to the plaintiff; for the return to it of rolling stock and equipments of the appraised value of \$147,592, which went into the defendant's possession at the time it took the plaintiff's road, and which it still retains; and for the determination and adjustment of the respective rights of the parties in and to certain lands, depots and tracks, situate in Manchester. In bar of the plaintiff's right to a recovery the defendant files three special pleas, and, as to the matters in the bill not covered by the pleas, it demurs. The plaintiff demurs to the pleas.

The first plea avers that the contracts between the parties, under which the defendant went into and retained the possession and management of the plaintiff's road for more than thirty years, were wholly beyond the corporate power of either party to make or to ratify and that therefore the defendant should be hence dismissed with its costs and charges. In other words, not denying that it has received the full benefit of the performance of the contract by the plaintiff, the defendant says that it should in equity be permitted to retain the benefit and property so acquired, and be dismissed with costs, because it was not empowered by its charter to perform what it promised the plaintiff in return. The demurrer to this plea is sustained. The defense set up is, in the judgment of the court, so repugnant to the natural sense of justice, so contrary to good faith and fair dealing, and so opposed to the weight of modern authority, that it need only be said that, in equity at least, neither party to the transaction *ultra vires* simply, will be heard to allege its invalidity while retaining its

<sup>1</sup> *Rice v. Western New York & P. R. Co.* 3 Inters. Com. Rep. 162.

fruits. However the contractual power of the defendant may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract, nor as a corporation is it exempt from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.

The second plea avers, and the demurrer of course admits, that at the time of the making of the contracts between the parties, and of the dealings thereunder, their respective roads "were rival and competing railroads, by the competition of which the prices of transportation thereon were, and, but for said supposed contracts, dealings, transactions, operations and business would have continued to be, materially reduced, and said alleged contracts, dealings, transactions and business were made and had for the purpose of destroying and preventing such competition, and did destroy and prevent it." It will be noticed that there is no averment in the plea that the purpose of the contracts was to raise the prices of transportation above a reasonable standard, or that they did have this effect, or that the public were prejudiced by their operation in any manner; and the naked question presented then is, whether all contracts between rival railway corporations which prevent competition are necessarily contrary to public policy, and therefore *mala prohibita* and illegal in themselves. To state this question it is said, is to answer it in the negative, because it is obvious that the illegality depends upon circumstances. While, without doubt, contracts which have a direct tendency to prevent a healthy competition are detrimental to the public and consequently against public policy, it is equally free from doubt that when such contracts prevent an unhealthy competition, and yet furnish the public with adequate facilities at fixed and reasonable rates, they are beneficial, and in accord with sound principles of public policy. For the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation; and the theory which formerly obtained that the public is benefited by unre-

stricted competition between railroads, has been so emphatically disproved by the results which have generally followed its adoption in practice, that the hope of any permanent relief from excessive rates through the competition of a parallel or rival road may, as a rule, be justly characterized as illusory and fallacious. Upon authority, also, arrangements and contracts between competing railroads, by which unrestrained competition is prevented, do not contravene public policy.<sup>1</sup> In the case just cited a bill in chancery had been filed by a stockholder in the defendant company to annul an agreement between two railway companies to divide the profits of the traffic in fixed proportions; and it was admitted there, as it is here, that the purpose of the agreement was to prevent competition. In dismissing the bill Vice Chancellor Wood said (p. 103): "With regard to the argument against the validity of the agreement, I may clear the ground of one objection by saying that I see nothing in the alleged injury to the public arising from the prevention of competition. . . . It is a mistaken notion that the public is benefited by pitting two railway companies against each other till one is ruined, the result being at last to raise the fares to the highest possible standard." So, also, in 1 Redf. Railways, § 146, par. 2, it is said: "There is no principle of public policy which renders void a traffic arrangement between two lines of railway for the purpose of avoiding competition." And Mr. Morawetz says, in his admirable treatise on Corporations: "Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin; and, so far as agreements among companies are designed to effect this result, their purpose is not injurious to the public, or illegal. Moreover, such agreements are positively beneficial to the public, so far as they prevent the fluctuation of rates and unjust discrimination among shippers, which invariably attend the unrestricted competition of rival companies. It is therefore impossible to support the proposition that all agreements among railroad companies which restrict competition are condemned by law. Some such agreements may be contrary to public policy, and unlawful; but if an agreement of this char-

<sup>1</sup> See *Hare v. London & N. W. R. Co.* 2 Johns. & H. 180.

aeter is a reasonable business arrangement to protect the shareholders and creditors of the companies from loss, and does not cause unreasonably high charges or violate any duty which the companies owe to the public, it should be sustained and enforced by the courts.”<sup>1</sup> In the same section, in speaking of contracts in restraint of trade (to which many of the authorities and much of the argument for the defendant relate) he says: “Even if there were such a rule, as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and ‘wars’ among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law to charge more than reasonable rates. It should be observed also that competition among railroad companies has not the same safeguards as competition in trade. Persons will ordinarily do business only when they think they see a fair chance of profit; and if press of competition renders a particular trade unprofitable, those engaged in that trade will suspend or reduce their operations, and apply their capital and labor to other uses, until a reasonable margin of profit has been reached. But the capital invested in the construction of a railroad cannot be withdrawn when competition renders the operation of the road unprofitable. A railroad is of no use except for railroad purposes, and if the operation of the road were stopped the capital invested in its construction would be wholly lost. Hence it is for the interest of a railroad company to operate its road, though the earnings are barely sufficient to pay the operating expenses. The ownership of the road may pass from the shareholders to the bondholders, and be of no benefit to the latter; but the struggle for traffic will continue so long as the means of paying operating expenses can be raised. Unrestricted competition will thus render the competitive traffic wholly unremunerative, and will cause

<sup>1</sup> Morawetz, Corp. (2d ed.) § 1131.



the ultimate bankruptcy of the companies unless the portion of their traffic which is not the subject of competition can be made to bear the entire burden of the interest and fixed charges."\* The application of these principles, the court say, to the plea under consideration is patent and decisive. The geographical location and relative resources of the two roads were such as to render it obvious that the plaintiff could not reasonably hope to successfully compete with its more powerful rival. The alternatives presented, it may safely be assumed, were combination or ruinous competition. It accepted the former; and as the combination did not, so far as appears by the pleadings, raise the rate of transportation above the standard of fair compensation, or violate any duty that is owing to the public from roads which are non-competing, there is nothing averred in the plea which bars the right of the plaintiff to an accounting with the defendant. Numerous cases have been cited in behalf of the defendant in support of its proposition that the combination between the parties must be regarded as void at common law because against public policy. For want of time it is quite impossible to go through and comment upon these cases in detail, but it is sufficient to say in general terms, that they are cases of contract in restraint of mercantile business; or cases of contracts which attempt to derogate from the right of eminent domain inherent in the state; or cases where contracts between railroad companies were held contrary to public policy because one of the parties attempted to bind itself not to perform duties incident to the legal character of common carriers or public servants; or cases where contracts between railroad companies were held contrary to public policy because one of the parties agreed not to build or to cease to operate a road which it was

\*NOTE.—There are many cases sanctioning the doctrine that combinations may be formed where the purpose is lawful and the means employed not forbidden by positive law or high considerations of public policy. *Central Trust Co. v. Ohio Cent. R. Co.* 23 Fed. Rep. 306, 23 Am. & Eng. R. Cas. 666; *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 391, 32 Am. & Eng. R. Cas. 633; *Leslie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519; *Hare v. London & N. W. R. Co.* 2 Johns. & H. 80, 7 Jur. N. S. 1145; *Manchester & L. R. Co. v. Concord R. Co.* 9 L. R. A. 689, 3 Inters. Com. Rep. 319, 66 N. H. —, 8 Ry. & Corp. L. J. 443.

chartered to build or operate ; or cases where contracts between railroad companies have been held illegal merely on the ground that they were *ultra vires*,—in short, they do not establish a rule which fairly includes a case like the one at bar. The demurrer to the second plea was on this reasoning sustained.

The averment in the third plea is, “that during all the time from said December 1, 1856, until July 1, 1887, the roads of the plaintiff and defendant each constituted a part of the different lines of route for public travel and transportation between cities and towns within and without this state, forming rival and competing lines of route between such points.” This plea was understood to be based upon the statute of July 5, 1867, entitled “An Act to Prevent Railroad Monopolies,” and providing, among other things, “that two or more railroad corporations chartered by the legislature of this state, constituting the whole or parts of different lines of route for public travel and transportation between any two cities or towns, or between any city and town, either within or without this state, forming rival and competing lines of route between such points, shall not be allowed to consolidate such roads or lines ; and neither of said lines, or any road or roads composing the same, shall be run or operated by any such rival and competing line, or any road or roads, portion thereof, under any business contract, lease or other arrangement, but each and every railroad corporation so situated shall be run, managed and operated separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition, unless such lease, contract or arrangement be first authorized by the legislature, and approved by the governor and council.” When this Act was passed, the contract in force between the parties, and under which the roads were then being operated, was that of December 27, 1860 ; and the claim of the defendant is that whatever may be said with reference to the prior contracts and to the operation of the roads under them up to the time of the passage of the Act of 1867, that Act rendered the further execution of the

contract of December 27th illegal and prohibited it. This point is declared to be well taken. Whatever may now be the sentiment of New Hampshire in respect to the operation of railroads since the results attendant upon consolidation have been sufficiently demonstrated to remove any intelligent fear of extortion in rates or deterioration of service, there can be no doubt that in 1867 its sentiment was in favor of independent and competing lines, and that the purpose of the legislature was to make the act in question an effective instrumentality against the consolidation of competing roads through contracts or arrangements between them, by means of which competition is removed.<sup>1</sup>

The act, of course, had no *ex post facto* application, and was therefore of no effect as to anything which had already been done by the parties under the contract of December 27th, but it did prohibit them from further operating the roads under that contract (unreported opinion of Bellows, J., in *Currier v. Concord R. Corp.*, December Law Term, 1871) and so far rendered it void as to deprive either party of the right of recovering expressly for its subsequent breach. Nevertheless, the defendant is not in the opinion of the court entitled to retain the money or other property so acquired, and for which it has rendered no corresponding equivalent to the plaintiff in return, but, on the contrary, it is its duty to make equitable compensation and restitution, and the duty may be enforced in this proceeding. It is true that, in general, where parties are concerned in illegal agreements or other transactions, whether they are *mala prohibita* or *mala in se*, courts of equity will not interpose to grant relief; but this is so only when the parties stand upon equal footing, for the doctrine everywhere running through the books is that relief will be granted when both parties are *in delicto*, provided they do not stand *in pari delicto*.<sup>2</sup>

These parties do not so stand, for, however guilty the plaintiff may have been in permitting or in concurring in the illegal operation of its road by the defendant after the Act of July 5th, its

<sup>1</sup> *Currier v. Concord R. Corp.* 48 N. H. 325; *Fisher v. Concord R. Co.* 50 N. H. 268.

<sup>2</sup> See Story, Eq. Jur. (12th ed.) §§ 98, 300.

guilt must fairly be regarded as far less in degree than that of its associate in the offense. And that the legislature regarded the defendant as the greater offender is made entirely plain by the fact that the only penalty prescribed by the Act of July 5th for the violation of its provisions is imposed upon the road which operates another road, and not upon the road which is operated; for the reading of the second section is that "in all cases where any road, its directors, officers or agents, shall hereafter enforce or attempt to enforce or exercise any authority over any other road, situated as provided in said first section, or do any act in conflict with said first section, such officers or agents shall severally be subject to a fine or liability not exceeding five hundred dollars for each offense, to be recovered by action of debt, or by information or indictment, for the use of the county within which such suit shall be instituted." These considerations, as well as others of a kindred character, which need not be adverted to, bring the case fully within the exception to the general rule, that equity will not grant relief to parties concerned in illegal transactions; and if this be so, it is the end of the case as regards the questions raised by the pleas, because, if the transactions between the parties were of the character which the defendant now ascribes to them, the plaintiff, not being *in pari delicto*, is entitled to participate in the property accumulated or its proceeds, which, as between the parties, will be divided according to equity, and it has not been argued to the contrary in the defendant's behalf. There is, however, another ground of relief, which should be briefly mentioned. The contracts have been executed on the part of the plaintiff; they were not immoral; and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, "that if an agreement is legally void and unenforceable by reason of some statutory or common law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it in-

volves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case.”<sup>1</sup>

He adds: “These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received.”<sup>2</sup>

The leading case of *Brooks v. Martin* was a bill in equity for an account of profits between the parties under an executed partnership contract for the purchase and location of soldiers' land warrants “confessedly against public policy,” as well as in violation of the express provisions of an Act of Congress; but the court held that the partner in whose hands the profits were, could not refuse to account for or divide them, on the ground of the illegal character of the original contract, saying (Miller, J., p. 80 [735]): “It is to have an account of these funds, and a division of these proceeds, that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of these funds to refuse to do equity to his other partner, because of the wrong originally done or intended to the soldier? It is difficult to perceive how the statute, enacted for the benefit of the soldier, is to be rendered any more effective by leaving all this in the hands of Brooks, instead of requiring him to execute justice as between himself and his partner, or what

<sup>1</sup> Morawetz, Corp. § 721.

<sup>2</sup> *White v. Franklin Bank*, 22 Pick. 181; *Dill v. Wareham*, 7 Met. 438; *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 Pick. 373; *Whitney v. Peay*, 24 Ark. 22; *Philadelphia Loan Co. v. Towner*, 13 Conn. 249; *Foulke v. San Diego & G. S. P. R. Co.* 51 Cal. 365; *Farmers Loan & T. Co. v. St. Joseph & D. C. R. Co.* 1 McCrary, 247, 2 Fed. Rep. 117; *Madison Ave. Baptist Church v. Baptist Church in Olive Street*, 73 N. Y. 82; *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Sacketts Harbor Bank v. Codd*, 18 N. Y. 248; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Vanatta v. State Bank*, 9 Ohio St. 27; *United States Exp. Co. v. Lucas*, 36 Ind. 361. See also *Pratt v. Short*, 79 N. Y. 437, 35 Am. Rep. 531; *Owen v. Davis*, 1 Bail. L. 315; *Gilliam v. Brown*, 43 Miss. 641; *Western U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 558, 3 Fed. Rep. 423; *Lewis v. Alexander*, 51 Tex. 578; *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 732, and cases cited; *Planters Bank of Tennessee v. Union Bank of Louisiana*, 83 U. S. 16 Wall. 483, 21 L. ed. 473, and cases cited; *Central Trust Co. v. Ohio Cent. R. Co.* 23 Fed. Rep. 306.

rule of public morals will be weakened by compelling him to do so. . . . The transactions which were illegal have become accomplished facts, and cannot be affected by any action of the court in this case." It is true that the doctrine of this case has been criticised, and perhaps denied, by some of the state courts; but it was reaffirmed in *Planters Bank of Tennessee v. Union Bank of Louisiana*, and it is not found to have been been changed or modified in any subsequent decision.

In the case of *Carrier v. Concord R. Corp.* 48 N. H. 322, the court says: "Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion; but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendant should not keep any part of the plaintiff's equitable share of the property it obtained from operating the plaintiff's road, whether legally or illegally. Whatever the legislature may have intended to accomplish by the Anti-Monopoly Act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And, however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and it is impossible to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and common honesty, and which in conscience the benefited party cannot retain. Various causes of demurrer to the bill are assigned by the defendant, but at the argument only the one relating to discovery was insisted upon, or need in the judgment of the court be considered. The bill prays "that the defendant be ordered to make a full, accurate and true discovery and disclosure of all and singular the matters and things herein set forth." This is the usual prayer for a discovery, and no objection to its sufficiency is perceived. It is immaterial that the prayer concludes with a request that the defendant be required, but not under oath, . . . to discover and state, fully and with particularity, certain things

specified; for, if the word 'answer,' which it is said was intended to be used, is substituted for 'discover,' the first objection of the defendant, that a prayer for a discovery not under oath cannot be granted, is readily obviated. The second objection, that the policy of the law exempts the defendant and its officials from discovery, is said to be based wholly upon the unfounded assumption that the plaintiff's action is against public policy, and has already been sufficiently considered. The third and last objection is that the fundamental law does not require the defendant to discover. The argument in its support is that the defendant is charged with the doing of that which was positively prohibited by the Act of July 5, 1867; that, if the charge is sustained, each of the defendants is liable to the penalty prescribed by the Act; and that they are asked to make discovery of facts, which, in any event, would tend to fix their penal liability under that Act, contrary to the constitutional provision that 'no subject shall . . . be compelled to . . . furnish evidence against himself.' This objection is held to be unavailing. Of course the defendants are not obliged to discover any matters that may expose them to the penalty of the Act of 1867; but they cannot do so, however willing they may be, because prosecution under that Act is barred by the statute of limitations. The transactions between the parties as to which discovery is sought ended July 1, 1887, and section 10, chap. 266, Gen. Laws, provides that "all prosecutions founded upon any penal statute, which are wholly or in part for the use of the prosecutor, shall be brought within one year, and all other suits and prosecutions thereon within two years, after the commission of the offense, unless otherwise specially provided." The demurrer was therefore overruled.

### § 121. *Rebate—Contract to Repay the Shipper a Part of the Rate.*

Where a carrier agrees that he will carry goods at a certain rate and that after the shipment he will repay the shipper a rebate of part of such rate, this, it has been said, is only an agreement to carry the goods at a compensation ultimately agreed upon, and is

not illegal. Discrimination in the making of contracts by a carrier for the carriage of goods without partiality is inoffensive. Partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another, who stands upon an equal footing. Common carriers may, within the limits of fairness and impartiality, consult their own interests in making contracts for the carriage of goods.<sup>1</sup> But it has also been held that the allowance of a rebate by a common carrier to certain of his customers, from the tariff rates charged other customers for precisely similar services, is sufficient of itself to show that the rates charged the latter were unreasonable, and that there was unjust discrimination against them, illegal by the common law, which will give the latter a right to recover the amounts paid by them in excess of the rates charged the former after deducting the rebates.<sup>2</sup>

An agreement by a railroad company to transport coal at a specified rebate from regular tariff rates in consideration of the shippers erecting a dock and coal pockets on the company's land for use by both parties, is not as matter of law void because of unjust discrimination against other shippers, especially where the shipper also agrees to do his own loading and to ship in large quantities. The question of unjust discrimination is one of fact.<sup>3</sup> When the consideration paid for reduced rates by a favored shipper is obviously equal to the discount allowed him, there is in fact no discrimination, and the contract is not obnoxious to the law prohibiting discrimination between shippers.<sup>4</sup> Where a common carrier subject to the Act to Regulate Commerce has established and published its schedule of rates and charges for a station on its line, free cartage furnished by the carrier for the collection and delivery of freight carried on its road to or from such station operates as a reduction or rebate from the schedule charge, and is

<sup>1</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

<sup>2</sup> *Cook v. Chicago, R. I. & P. R. Co.*, 3 Inters. Com. Rep. 383, 9 L. R. A. 764 81 Iowa, 551.

<sup>3</sup> *Root v. Long Island R. Co.* 2 Inters. Com. Rep. 576, 4 L. R. A. 331, 114 N. Y. 300.

<sup>4</sup> *Goodridge v. Union Pac. R. Co.* 37 Fed. Rep. 182.



unlawful. If free cartage at a station has the effect to reduce a rate below the charge at another station nearer the point of shipment, it is unlawful as a less charge for a longer distance over the same line and in the same direction, the less being included within the greater. It is not material to the question of the lawfulness of free cartage furnished at one town and not at another that the business was done in that way for many years before the Act to Regulate Commerce was enacted. If what was done and is now done works unjust discrimination or is in any particular obnoxious to the law, it is an abuse, and one that it must be assumed was intended to be corrected by the Act. The respondent company had a tariff schedule in effect grouping the rates from eastern points at Ionia and Grand Rapids in Michigan, Ionia being the shorter distance, and furnished free cartage at Grand Rapids and not at Ionia. Upon complaint by a firm of dealers at Ionia, it was ruled that the free cartage at Grand Rapids was in effect a rebate and unlawful.<sup>1</sup>

The common law rule that he who attacks a contract has the burden to show its invalidity, prevails in the Colorado courts. Therefore a contract of rebate must be held valid until shown to be otherwise.<sup>2</sup> An agreement between a carrier and a miller to give the latter a rebate on coal shipped to him, used in the manufacture of corn into meal, is valid under Ala. Code 1886, § 1161, where public notice by the general freight agent authorized such rebate on coal used in manufacturing.<sup>3</sup> A contract by a railroad company to carry corn at the customary rates, and to grant a rebate to the shipper, is not illegal as being in violation of the law to prevent unjust discrimination; nor is it fraudulent as to the purchaser of the corn.<sup>4</sup>

<sup>1</sup> *Stone v. Detroit, G. H. & M. R. Co.* 3 Inters. Com. Rep. 60.

<sup>2</sup> *Bayles v. Kansas Pac. R. Co.* 2 Inters. Com. Rep. 643, 5 L. R. A. 480, 13 Colo. 181.

<sup>3</sup> *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 9 Ry. & Corp. L. J. 451.

<sup>4</sup> *Christie v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 22, 94 Mo. 453.

## CHAPTER XVIII.

### UNJUST DISCRIMINATION.

§ 122. *Discrimination by One Carrier against Another.*

§ 123. *Blanket or Group Rate—Preference Given one Locality over Another.*

§ 124. *Discrimination between Shippers—Rebate.*

§ 122. *Discrimination by One Carrier against Another.*

The question of reasonable or unreasonable preference by railway companies has been considered in several cases by the English courts; but the cases arose under the "Railway & Canal Traffic Act 1854" (17 & 18 Vict. chap. 31) and furnish but little aid in the determination of questions in this country, except in states which have adopted the legislation somewhat similar in character to that of the English rule. They are instructive and of high authority as to what would be undue or unreasonable preference among competing customers, but none of them relate to the rights of connected railroads where there is no provision in law for their operation as continuous for business. And here it is proper to remark that in the very Act under which these cases arose it is provided that "every railway company . . . working railways . . . which form part of a continuous line of railway . . . communication . . . shall afford all due and reasonable facilities for receiving and forwarding by one of such railways . . . all the traffic arriving by the other, without any unreasonable delay and without any . . . preference or advantage or prejudice or disadvantage . . . and so that no obstruction may be offered to the public desirous of using such railways . . . as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways . . . of the several companies, be at all times afforded to the

public in that behalf." If complaint was made of a violation of this provision, application should be made to the courts for relief. There is no power in the judiciary to do what the parliament of Great Britain has done and what the proper legislative authority ought perhaps to do, for the relief of the parties discriminated against.

All the American cases relate either to what amounts to undue discrimination between the customers of a railroad company, or to the power of a court of chancery to interfere, if there is such a discrimination. None of them hold that, in the absence of statutory direction or a specific contract, a company having the power to locate its own stopping places can be required by a court of equity to stop at another railroad junction and interchange business or that it must under all circumstances, give one connecting road the same facilities and the same rates that it does to another with which it has entered into special contract relations for a continuous through line, and arranged facilities accordingly. The time and manner in which a railroad company will carry persons and property, and the price to be paid therefor, are subject to legislative regulation; but in the absence of such regulation it owes only such duties to the public as the common law or custom has established.

A railroad company is prohibited from discriminating unreasonably in favor of or against another company seeking to do business on its road. But that does not necessarily imply that it must stop at the junction of one and interchange business, because it has established joint depot accommodations with another company at another place.<sup>1</sup> The fact that a railroad company makes such arrangement for one of its branch roads will not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system.<sup>2</sup> A carrier may require prepayment of freight charges from any shipper, at its choice, and may lawfully refuse to receive freight from a receiving carrier without such prepayment, although it does not require it

<sup>1</sup> *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291.

<sup>2</sup> *Re Joint Water & Rail Lines*, 2 Inters. Com. Rep. 486.

from others; but notice of such requirement should be given to the shipper or receiving carrier.<sup>1</sup>

The right of railway companies to enter into a just and fair arrangement with shippers for the purpose of increasing their business, must be admitted, although the effect of the arrangement may take business from others. They may extend more favorable terms to all shippers, with a view of increasing their business, although others engaged in the same business may be incidentally injured thereby. It cannot be made a ground of complaint that the public patronizes those lines of transportation which give the most favorable terms.<sup>2</sup> But a carrier cannot decline to receive goods from a shipper, because he offers like transportation to another carrier.<sup>3</sup>

It is an undue preference, within the meaning of the English Railway & Canal Traffic Act of 1854, § 2, for a railway company, for the purpose of discouraging the construction of a competing line, to carry the product of certain mines at a less rate for mine owners who contracted to furnish the product of other mines for a series of years, than is charged to other mine owners who refuse to enter into such a contract.<sup>4</sup> The commercial necessities of a railway in meeting competition are not to be excluded from consideration, although that alone would not justify a preference, in determining whether, under the English Railway & Canal Traffic Act 1888, § 27, the public interests require the existence of the rates complained of.<sup>5</sup> A reduced rate to the terminus of a through route, under the compulsion of competition, is not unjust discrimination against a nearer town not located on the line of the through route, but reached over a lateral connecting road.<sup>6</sup>

Rates should be so relatively reasonable as to protect communities and business against unjust discrimination.<sup>7</sup> An advantage

<sup>1</sup> *Randall v. Richmond & D. R. Co.* 103 N. C. 612.

<sup>2</sup> *Munhall v. Pennsylvania R. Co.* 92 Pa. 150.

<sup>3</sup> *Chicago & A. R. Co. v. Suffern*, 129 Ill. 274.

<sup>4</sup> *Diphwys Casson Slate Co. v. Festiniog R. Co.* 2 Nev. & McN. 73.

<sup>5</sup> *Liverpool Corn Trade Asso. v. London & N. W. R. Co.* [1891] 1 Q. B. 120, 45 Am. & Eng. R. Cas. 216.

<sup>6</sup> *Lehmann v. Southern Pac. Co.* 3 Inters. Com. Rep. 80.

<sup>7</sup> *Bards of Trade Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 608.

given by a railroad, in establishing its charges on different branches on its road, to competing towns on the main line, must not be unreasonable.<sup>1</sup> Transportation charges are required to be relatively reasonable, as well as reasonable in themselves, to prevent unjust discrimination between localities.<sup>2</sup>

A railroad company can require a connecting company to receive through cars and take freight in them over its line without transfer, although the use of the latter's terminals and terminal facilities will necessarily be required for the service, and although the roads are parallel and rival lines, and the service of transporting the freight has been practically performed by one company which needs the assistance of its rival simply to deliver the freight at points near the terminus of its road. For this purpose no contract between the companies is necessary. The connecting company may be required to receive passengers under similar circumstances. The intervention, between two railroads, of a terminal system owned by an independent company, will not prevent the roads from being connecting lines, within the meaning of the Interstate Commerce Act, requiring such lines to interchange business; at least where the stock of the terminal company is owned by the two roads jointly, or by one of them in such manner that the terminal in reality forms a part of its road. What are reasonable facilities for an interchange of business between connecting railroad companies, within the requirements of the Interstate Commerce Act, depends upon the state of the traffic and the business; and the question is to be determined by what is considered reasonable by the public, and what is required to conveniently transact the business. A railroad company may be compelled to offer the same facilities for interchange of cars and freight in bulk with one connecting road that it does with another. The Interstate Commerce Act prohibits any discrimination of this character.

One railroad company may have a right to issue bills of lading for freight and through tickets for passengers over a connecting

<sup>1</sup> *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 627.

<sup>2</sup> *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115.

road, although there is no contract between the companies.<sup>1</sup> Refusal to permit a forwarding company to perform an act involving the use of the tracks and terminal facilities of a receiving company is not a discrimination or denial of equal facilities by one carrier to a connecting carrier within the prohibition of the Interstate Commerce Act. The tracks and terminal facilities of a railroad company can be used by a connecting company for the exchange of interstate freight only with the consent of the former. No common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other in the same manner and to the same extent a third carrier is. The fact that one connecting railway company has a contract for the interchange of interstate freight which involves the use of the receiving railway's tracks and terminal facilities will not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company. A connecting railway company desiring an interchange of passengers and freight cannot demand as a matter of right an interchange of freight at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point, or compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection. A court of equity has no power under the Interstate Commerce Act to compel a receiving company which has made a contract or agreement with a connecting company to establish the same rate upon through freight in favor of another company with which there is no contract and compel the receiving company to accept that rate, as no power is conferred by the Act upon any tribunal to provide for the necessary divisions growing out of a through routing and a through rating. The insistence by a railway company upon its right to prepayment of the freight upon goods received from a connecting carrier, rather than to consent to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment as is done

<sup>1</sup> *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 205.

in case of freight received from other carriers,' cannot be construed to be a denial of equal facilities or a discrimination against the former. A railroad company cannot be compelled to receive connecting carrier's cars to facilitate transportation if it has idle cars of its own, although it receives freight from another competing road in the cars of the latter and transports them over its road.<sup>1</sup>

Breaking up a through billing arrangement at through rates, with a responsible company, without any reason therefor, and attempting to give all the business that would come under it to a different company, is unlawful. An order of the Interstate Commerce Commission, requiring a carrier to desist from a refusal to afford facilities to another carrier for the exchange of interstate traffic, equal to those furnished another road, previously accomplished by canceling a joint through tariff, is violated by restoring such tariff but altering the running time of trains so that the facilities are substantially no better than before. That the connecting points of other railroads with a certain road are sixteen miles apart does not necessarily make the conditions so different that the refusal to one of equal facilities for the exchange of interstate traffic, to those afforded the other, will not constitute undue discrimination. That a carrier has a special contract with an independent corporation of which it owns half the stock, making them a combination of carriers, does not make the railroad of the latter part of its own line, so that the furnishing to it of superior facilities for the exchange of interstate traffic will not constitute undue discrimination against a road connecting physically with itself.<sup>2</sup>

A New York railroad extending to Dayton, Ohio, by agreement being considered with an Ohio railroad extending from Dayton to Cincinnati, an initial road at Cincinnati, with right to make rates to that place, Cincinnati must be treated as a point upon the line for the purpose of proceeding against the company for unjust discrimination in refusing to furnish coal cars.<sup>3</sup> Charges by

<sup>1</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 59 Fed. Rep. 400.

<sup>2</sup> *New York & N. R. Co. v. New York & N. E. R. Co.* 4 Inters. Com. Rep. 117, 50 Fed. Rep. 867.

<sup>3</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

receiver of railroad in relation to interstate commerce business must be reasonable and just; and there can be no discrimination as to rates, charges or facilities for or against two connecting steamship lines.<sup>1</sup> But a railroad company operating steamers in connection with its railroad as a single line is not guilty of a discrimination against another carrier, within the prohibition of the Interstate Commerce Act, by refusing to allow a rival steamboat company to land its boats at a wharf used by it solely for connecting its railroad and boats, where there is no regular public station at such wharf, but the general station is at a little distance and ample facilities there exist.<sup>2</sup> When actual weights of goods shipped cannot be ascertained without needless inconvenience, estimated or constructive weights may be taken if the method of estimation works no inequality in its practical application to competing modes of conveyance.<sup>3</sup>

### § 123. *Blanket or Group Rate—Preference Given one Locality over Another.*

Preferences to localities in furnishing facilities or rates for the shipment of goods are prohibited.<sup>4</sup> But a railroad company cannot appropriate the grievance of a traffic or locality under the Interstate Commerce Act, § 3, prohibiting preference by a carrier to persons, firms, or corporations, and to localities and traffic, and complain on account of it.<sup>5</sup> Trade centers, or large commercial towns, are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributing centers; and if carriers shall give to such smaller towns rates as favorable as to the larger, the commission will not inter-

<sup>1</sup> *Re Mallory*, 1 Inters. Com. Rep. 294.

<sup>2</sup> *Iluaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.* 57 Fed. Rep. 673.

<sup>3</sup> *Rice v. Cincinnati, W. & B. R. Co.* 3 Inters. Com. Rep. 841.

<sup>4</sup> *Hozier v. Caledonian R. Co.* 24 L. T. 339, 1 Nev. & M. 27; *Jones v. Eastern Counties R. Co.* 3 C. B. N. S. 718, 1 Nev. & McN. 45; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Richardson v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 1; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291.

<sup>5</sup> *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* (C. C. App. 9th C.) 61 Fed. Rep. 158.



fere.<sup>1</sup> It is not ground of complaint against a railroad that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large towns which before had been specially favored.<sup>2</sup>

The fact that one city is much larger and has more important and extensive business interests than another and has been treated by the carriers in making rates to surrounding points as a "trade center," is no justification for a continuation of discriminatory rates in favor of such city. The object of the Act to Regulate Commerce was to eradicate the existing system of rebates and unjust discrimination in favor of particular localities, special enterprises and favored individuals.

Unjust discrimination as between localities or individuals cannot, in the nature of things, be essential to the business prosperity of the carrier, and it is no valid objection to the correction of unlawful rates to one point that it involves a like correction as to other points.<sup>3</sup> A tariff naming a rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, tenders a preference or advantage to the first; and when any shipper is damaged by the exaction of an additional burden the preference becomes undue and unreasonable, unless it can be justified upon some sound and substantial ground.<sup>4</sup> What amounts to an undue preference is a question of fact and not of law.<sup>5</sup> When a railroad company in establishing its charges on the different branches of its road so adjusted them as to divert trade and business to one locality, such unreasonable preference for one place is not excused by the fact that the rates are the result of competition with other carriers. An advantage given to a competing town on the main line must not be unreasonable.<sup>6</sup>

<sup>1</sup> *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 32.

<sup>2</sup> *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>3</sup> *Board of Trade of Troy v. Alabama Midland R. Co.* 4 Inters. Com. Rep. 349.

<sup>4</sup> *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203.

<sup>5</sup> *Diphwys Casson Slate Co. v. Festiniog R. Co.* 2 Nev. & McN. 73, 32 L. T. N. S. 271; *Watkinson v. Wrexham, Etc. R. Co.* 3 Nev. & McN. 5; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 3 Nev. & McN. 441.

<sup>6</sup> *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 627.

The right of one locality to equal rates with another is not diminished by municipal subscriptions for the building of the road.<sup>1</sup>

The Board of Trade of Eau Claire, Wis., claimed that the Chicago, Milwaukee & St. Paul Railway Company and others did not discriminate justly as to rates between places practically equidistant and relatively small, but differing as to favorable commercial conditions. The commission held that there should be substantial similarity of rates as to such places, unless other qualifying circumstances intervene to justify disparity. Commissioner Knapp, in the opinion of the Interstate Commerce Commission, says: "That rates should be fixed in inverse proportion to the natural advantages of competing towns with a view to equalizing 'commercial conditions,' as they are sometimes described, is a proposition unsupported by law, and quite at variance with every consideration of justice. Each community is entitled to the benefits arising from its location and natural conditions, and the exaction of charges unreasonable in themselves, or relatively unjust, by which those benefits are neutralized or impaired, contravenes alike the provisions and the policy of the statute."<sup>2</sup> Had the commission held otherwise, its views would have been manifestly unsound. It would have retarded the healthy growth and prosperity of towns and cities favored by nature above those for the time being in other respects of similar size and consequence. The law was intended to secure the just and natural development of all commercial centers alike, and to prevent discriminations that would enable communities possessing inferior natural advantages to rival in strength and importance those having inherent possibilities of a superior order.

Manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product.<sup>3</sup>

<sup>1</sup> *Lincoln Board of Trade v. Burlington & M. R. R. Co.* 2 Inters. Com. Rep. 95.

<sup>2</sup> *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65.

<sup>3</sup> *James v. Canadian Pac. R. Co.* 4 Inters. Com. Rep. 274.

Where complaint alleges that a greater charge, in the aggregate, for the transportation of a like kind of property, is made for a shorter than for a longer distance, over the same line in the same direction, the shorter being included in the longer, and that an unlawful preference is thereby given one locality over another, it is held that the complaint is sufficient to put the carriers on proof that the services were rendered under such dissimilar circumstances as to justify the greater charge.<sup>1</sup> Whether the present effect or practices complained of as giving undue preference to one town over another by traffic rates be serious or trivial, if they are legally objectionable and may lead to consequences injurious to the interests of the complainants, the court should not refuse to interfere.<sup>2</sup>

A town favorably situated with respect to one through route, but competing in a common market with another town more favorably located on another through route, should not have a reduction of the local rate over roads connecting the two through routes for the purpose of overcoming the natural advantage which the latter competing town enjoys. A milling town possessing great natural, acquired, and improved advantages for the carrying on of that industry, and favorably situate in point of distance to a large grain producing region, is entitled to the benefits arising from its location; and carriers of grain to that point and to a competing town considerably more remote from points of production and in other particulars less advantageously located are not justified in making rates on grain to the competing towns which destroy the advantage the former is entitled to enjoy.<sup>3</sup>

The Act to Regulate Commerce, § 2, forbidding unjust discriminations, applies even in cases where a departure from the "long and short haul rule" of the statute is shown to be authorized; and the right, if established, of making the greater charge for the shorter haul, does not justify a disparity in rates so great

<sup>1</sup> *San Bernardino Board of Trade v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 138.

<sup>2</sup> *Liverpool Corn Trade Asso. v. London & N. W. R. Co.* [1891] 1 Q. B. 120, 45 Am. & Eng. R. Cas. 216.

<sup>3</sup> *Chamber of Commerce of Minneapolis v. Great Northern R. Co.* 4 Inters. Com. Rep. 230.

as to result in unjust discrimination. The facts that the rates to the longer distance point cannot be raised without a loss of the traffic involved, and that the rates to both the longer distance point and the shorter distance point are not unreasonable in themselves, do not justify a disparity in such rates resulting in unjust discrimination as against the shorter distance point. Competition at St. Paul with sugar from the east refined in New York, although necessitating low rates to St. Paul on sugar from the west refined at San Francisco, does not justify a greater charge on the latter to Fargo than to St. Paul.<sup>1</sup>

A railroad company making a scale of charges for the carriage of coal, from two points respectively to various places, the effect of which is to diminish the natural advantages which the dealers at the second point possess over those at the first point—from their greater proximity to those places—by practically destroying in the matter of expense of carriage in favor of the latter, a certain portion of the distance between the first point and those places,—gives an undue preference to the dealers at the first point over those at the second point.<sup>2</sup> The proposition of the law seems to be that, where the circumstances and conditions of two localities are substantially similar, there shall be no advantage or preference given to one which is not also freely offered to the other. To give an advantage or preference, under such circumstances, to one place would be undue, or, in other words, would be giving to the favored locality an advantage, which did not of right belong to it, and producing an undue prejudice against the other locality.<sup>3</sup>

The “long and short haul rule” of the statute was intended to maintain and promote, and not to destroy or neutralize, natural commercial advantages resulting from location.<sup>4</sup> When the reasonableness of rates is in question, charges on long through lines cannot offer a just basis for comparison with local rates for rela-

<sup>1</sup> *Raworth v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 857.

<sup>2</sup> *Ransome v. Eastern Counties R. Co.* 4 C. B. N. S. 135.

<sup>3</sup> *Anthony Salt Co. v. Missouri Pac. R. Co.* 4 Inters. Com. Rep. 33.

<sup>4</sup> *Raworth v. Northern Pac. R. Co.* *supra*.

tively short distances.<sup>1</sup> The apportionment of rates to different parts of a through line do not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance.<sup>2</sup> An unreasonable adjustment of joint rates for through transportation may constitute an unreasonable discrimination against local traffic.<sup>3</sup>

The provisions of the Interstate Commerce Law against undue discriminations in rates cannot be evaded by billing cars first to one point on the line of a railroad, and rebilling them to another point thereon at a different rate.<sup>4</sup> A railroad company violates the Interstate Commerce Law by forwarding grain from Nebraska through Iowa to Chicago, Illinois, at a less rate than it charges to Chicago from points in Iowa through which the grain from Nebraska passes, although the grain from Nebraska is technically to be delivered at points in Illinois some distance from Chicago.<sup>5</sup> Any advantages which inure to Michigan salt manufacturers as against those of Kansas, from rates to points in Iowa, Illinois, Missouri, and Nebraska, are advantages arising from natural situation; and a low rate to Missouri river points is influenced by water competition and also by the heavy preponderance of east bound freight over west bound freight. The advantages of distance belonging to Kansas salt fields as against those of Michigan should be given to them by a carrier in any territory supplied by its lines which lies as near, or nearer, to Hutchinson as to St. Louis.<sup>6</sup> Any greater charge for the transportation of like kind of property from seaboard points to Chattanooga than for the longer distance through Chattanooga to Nashville is in violation of the Act to Regulate Commerce, § 4.<sup>7</sup> Rates on wheat from

<sup>1</sup> *Crests v. Richmond & R. Co.* 1 Inters. Com. Rep. 703. The principles laid down in this case restated and reaffirmed in *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 32.

<sup>2</sup> *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78.

<sup>3</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 597.

<sup>4</sup> *Osborne v. Chicago & N. W. R. Co.* 48 Fed. Rep. 49, 49 Am. & Eng. R. Cas. 12.

<sup>5</sup> *Junod v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 663, 47 Fed. Rep. 290.

<sup>6</sup> *Anthony Salt Co. v. Missouri Pac. R. Co.* 4 Inters. Com. Rep. 33.

<sup>7</sup> *Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 213.

points in North and South Dakota to Minneapolis should be adjusted upon the basis of distance over nearest practicable routes.<sup>1</sup> An arbitrary differential added to the rates from Chicago to New York to make the rate to Boston was held improper, and a percentage was ordered to be substituted, instead of the arbitrary sum.<sup>2</sup>

Where unreasonableness of freight rate on oil in carload lots is charged on short local hauls,—for example, from Titusville, Pennsylvania, to Buffalo, New York; and the charge is attempted to be sustained on a comparison of these rates with rates on what is usually an inferior grade of oil transported from Titusville, through Buffalo, to Perth Amboy, New Jersey, for export, chiefly in the cars of another company; and it appears that upon such shipments destined to Buffalo there are expensive terminal charges, while upon such shipments to Perth Amboy these terminal charges are far less considerable,—the circumstances and conditions which control the making of the rates in each instance are substantially dissimilar.<sup>3</sup> Discrimination in freight rates from Chicago to New York cannot be accomplished by a railroad company, either by applying a 22 cent through rate to freight originating west of Chicago on roads not in the arrangement, and to which is paid more than their *pro rata* share of such rate to New York, or by applying such rate to grain in store, by paying a “drawback” or “expense bill” based upon the fiction that the grain was still in transit, on the 22 cent rate, thus bringing the shipper’s rate from Chicago to New York down to 18.2 cents, instead of the regular 20 cent rate.<sup>4</sup>

The cost of the production of pig iron at a furnace situated on the Hudson river in the state of New York is much greater than at Youngstown, Ohio, or Birmingham, Alabama, or at other points in the west and south; and while the aggregate rate charged from Hudson furnace to New England mill is a great deal lower than the aggregate rate charged on the western and southern irons

<sup>1</sup> *Chamber of Commerce of Minneapolis v. Great Northern R. Co.* 4 Inters. Com. Rep. 236.

<sup>2</sup> *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.* 3 Inters. Com. Rep. 830.

<sup>3</sup> *Rice v. Western New York & P. R. Co.* 2 Inters. Com. Rep. 298.

<sup>4</sup> *United States v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 287.

to the same mills, yet it is not sufficiently so to overcome the difference in the cost of production; and the consequence is that the Hudson furnace finds itself at a serious disadvantage in competing with these western and southern irons in the markets and mills of the New England states where there is a very great demand for this class of property. But the commission has no power or authority to order other carriers not parties to the proceeding to raise their rates on pig iron transported from Youngstown and Cleveland, Ohio, to New England points in order to overcome the difference in the cost of production of pig iron now existing against the Hudson furnace; nor would the commission enter upon the consideration of any such subject in a proceeding to which such carriers were not parties and in which such localities sought to be burdened with higher rates, for example, Youngstown and Cleveland, Ohio, had no opportunity to be heard; and the findings of fact in the present proceeding, which show that the rates already charged the Hudson furnace by the defendants are in themselves, as well as relatively, just and reasonable rates, demonstrate that the commission could not order the defendants to lower these rates from Poughkeepsie to all points on the Boston & Albany Road one half, and to Holyoke nearly one half, in order to overcome the difference in the cost of production of pig iron now existing against the Hudson furnace.<sup>1</sup>

The board of trade of Chicago appeared before the Interstate Commerce Commission charging certain railway companies with unjust discrimination and giving undue advantage to a particular locality or description of traffic. Certain propositions of fact established by the evidence in this proceeding may be briefly stated as showing the character of the case and also on account of the light they throw upon the conclusions reached by the commission. The city of Chicago is the largest pork packing center in the country and is also the most extensive market for live hogs and all other live stock. Kansas City, Leavenworth, St. Joseph, Atchison, Omaha, Council Bluffs, Sioux City, Sioux Falls, Des Moines, Dubuque, Burlington, Cedar Rapids, Marshalltown, Fort Dodge,

<sup>1</sup> *Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co.* 3 Inters. Com. Rep. 248.

Keokuk, Grinnell, Ottumwa, and many other points that might be named in the interior of Iowa, are extensive pork packing centers, and the hog products packed at these cities are brought into direct competition with the hog products packed at Chicago, not only in the markets of the United States, but also in all other markets of the world where hog products are consumed. As articles of commerce the live hog and its product are in direct competition with each other at the points named and in the chief markets of this country. From Sioux City to Mississippi river points, and from Sioux City to eastern markets and seaboard cities *via* Mississippi river points, the rates are made considerably higher by the carriers on live hogs than on packing house product. With, however, the single exception of Sioux City, rates are made the same by rail carriers on live hogs and packing house product carried from Missouri river points to Mississippi river points, or from Missouri river points to eastern markets and seaboard cities *via* Mississippi river points, or from intermediate points in the states of Iowa and Missouri to Mississippi river points, or from intermediate points in Iowa and Missouri to eastern markets and seaboard cities *via* Mississippi river points, or from Chicago to eastern markets and seaboard cities and intermediate points. But upon all shipments of live hogs and packing house product from Missouri river points to the city of Chicago, or from intermediate points in the states of Iowa and Missouri to Chicago, the rate charged is much higher on live hogs than on packing house products.

The foregoing propositions of fact being true, the defendants and intervenors undertook to justify the discrimination made against Chicago upon various grounds, which, with the view of the commission upon each, may be briefly stated. They claim that trains carrying live hogs had the right of way over other freight trains and were run at a higher rate of speed on account of reaching the market at Chicago. But the evidence adduced did not show that this was of a nature and character that warranted the discrimination made in rates against Chicago. They also claim that there was much greater risk to the carrier in hauling live hogs than in transporting packing house product, but



the evidence showed that there was no appreciable difference in the risk of carrying the one as compared with the other. They further claim that it is more expensive to the carrier to haul live hogs than packing house products to Chicago. But the evidence did not sustain this ground of defense. They claim, and the evidence showed it to be true, that the lines of railway east of the Mississippi river and east of Chicago used double-deck cars for transporting live hogs, while the railway lines west of Chicago and between Missouri river points and Mississippi river points and Chicago, with the exception of the Chicago, Milwaukee & St. Paul Railway Company and the Atchison, Topeka & Santa Fé Railway Company, used single-deck cars, and that the two exceptional roads last named had but few double-deck cars. But this was found to constitute no justification for this discrimination in rates against Chicago. They claim that, counting coal, cooperage, salt and ice used in packing house work, live hogs brought in and packing house product carried out, the slaughtering of hogs at the packing houses at Missouri river points and in the interior of Iowa and Missouri furnished the rail carriers more tonnage than if the live hogs were transported to Chicago and converted into packing house product there. But this was not found to warrant the discrimination in rates made against Chicago.

By some it was insisted that as the rate on the live hogs from Missouri river points and from points in the interior of the state of Iowa, for example, to the packing house at Sioux City, added to the rate on packing house product from the packing house at Sioux City to Chicago, is but a trifle more than the rate on the live hogs from the first point of shipment above named to Chicago, that this equalized the rates relatively on live hogs and hog product. But the commission finds that there is no element of justice or fairness in making or computing rates upon any such basis as this, and that it constitutes no ground whatever for these discriminating rates against Chicago. The intervenors insist that there is a considerable shrinkage of the live hogs in being transported in cars long distances, and further claim that the meat is in better condition when converted into product near where the hogs are

reared and fresh than if this is done after the hogs are transported a long distance, and that therefore public considerations demand that the live hogs should be converted into product near where they are grown. But the commission finds that while there is a temporary shrinkage of from three to five per cent in the weight of a hog from Missouri river points and interior points in the states of Iowa and Missouri in a haul to Chicago, yet that the transportation business of the country has demonstrated that live hogs may, as articles of commerce, be transported great distances without any material injury or loss in value, and that neither these considerations separately nor both combined upon the evidence adduced furnish any ground for these discriminating rates against Chicago.

The intervenors also defend these discriminating rates against Chicago on the ground of immense investments of capital that have been made in the establishment of packing houses at Missouri river points and in the interior of Iowa and Missouri on the faith of these rates, which give employment to a large number of persons; that the business in these states has adjusted itself to this condition of affairs, and that now to make the changes in these rates claimed by petitioner would break up and ruin these packing houses. But upon the evidence the commission is unable to find that the preferential rates given to these large establishments in Iowa and Missouri and at Missouri river points as well as in other portions of the country are reasonable and just when compared with the heavy discriminations laid upon the packers and buyers of Chicago. A business like that involving the preparation for consumption of such a large and leading staple and necessary of life as meat, with all the competition that exists for it in different and competing localities, brought near to each other by the fast rail lines of the country, is too large to be done in a corner, and is a conspicuous instance of a commodity that requires at the hands of carriers rates that are not only reasonable and just in themselves, but relatively reasonable and just in their bearing upon these different localities.<sup>1</sup>

<sup>1</sup> *Board of Trade of Chicago v. Chicago & A. R. Co.* 3 Inters. Com. Rep. 233.

Upon investigation had in a proceeding instituted by the commission on its own motion, it appeared that the respondent had in force over its line to Nashville a special rate on coal when used for manufacturing purposes by persons named upon the manufacturers' lists prepared by the railroad company. These lists were furnished to dealers who, on selling coal to such manufacturers, issued certificates which entitled them to obtain a refund from the railroad company amounting to the difference between the regular and special rates. Pending investigation the respondent discounted the "manufacturers rate" and put in force a new coal tariff to Nashville whereby coal, "run of mines, nut and slack," is given a rate of \$1.00 per ton the year round, and "screened" coal a rate of \$1.15 per ton, April to September, and for the remainder of the year a rate of \$1.40 per ton. The rate from the same mines to Memphis, a point affected by water competition for coal traffic, is \$1.40 per ton on all coal the year round, and respondent buys coal at the mines and sells it in the Memphis market. Under these conditions the commission declared that the practice abandoned by the respondent common carrier of arbitrarily determining what persons should receive the so-called "manufacturer's rate" was a clear violation of the Act to Regulate Commerce; that the rate of \$1.00 per ton charged by respondent upon coal, "run of mines, nut and slack," is not unreasonably low, nor disproportionate to the rate of \$1.40 per ton to Memphis; neither, in view of circumstances affecting coal traffic at Memphis, is a rate of \$1.15 on screened coal to Nashville relatively unreasonable as compared with the Memphis rate, but so long as the Memphis rate does not exceed \$1.40, rates on said kinds of coal from the mines to Nashville should not during any portion of the year exceed \$1.00 or \$1.15, respectively, and any reduction in the Memphis rate should be accompanied by proportionate reductions in rates on said different kinds of coal to Nashville.<sup>1</sup>

The furnishing of free cartage by a railroad company at one place and not at another cannot be justified as analogous to the providing of a switch track for the benefit of customers whose

<sup>1</sup> *Re Louisville & N. R. Co.* 4 Inters. Com. Rep. 157.

storehouses are convenient to the railway track, since the latter is usual railway business while cartage is something not usually undertaken by railways. The fact that one city is a larger place than another does not create different circumstances and conditions which will justify a railroad company in furnishing free cartage for goods transported by it in the former and not in the latter, though it may reduce the cartage cost to the shipper at the former place in so far as the greater amount of business enables it to do carting at a cheaper rate than at the latter place. That the competitors of a railway company have their stations in a certain place in the business center, while its own is at a distance, does not create a dissimilar condition which will allow such company to furnish free cartage of goods while at another station it does not do so, if it would justify it in furnishing cartage at a price equal to that for which cartage can be obtained from the stations of such competitors.<sup>1</sup> It is not material to the question of the lawfulness of free cartage furnished at one town and not at another, that the business was done in that way for many years before the Act to Regulate Commerce was enacted.<sup>2</sup>

The doctrine that transportation charges should be proportioned to the distances between different points, where those distances are greatly dissimilar, has never been advocated by the railroads or recommended by the commission. While distance is an ever present element in the problem of rates and not unfrequently a controlling consideration, the general practice of rate making is opposed to the principle of exact proportion. It may be the rule to which tariff construction will sometimes approximate, but to fix the rate for a thousand miles at twice the sum prescribed for half the distance would be most arbitrary and intolerable. Where all the distances brought into comparison are considerable, and the differences between them relatively small, there should be substantial similarity in the respective rates, unless other modifying circumstances justify disparity.<sup>3</sup> Rates that

<sup>1</sup> *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 4 Inters. Com. Rep. 722, 57 Fed. Rep. 1005.

<sup>2</sup> *Stone v. Detroit, G. H. & M. R. Co.* 3 Inters. Com. Rep. 60.

<sup>3</sup> *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65.

are just and reasonable from selected manufacturing points through the entire territory east of Missouri river and west of the Atlantic seaboard, are *prima facie* just and reasonable from all other points in the same territory.<sup>1</sup> The commission refuses to determine the relative reasonableness of rates at many stations, and in a large extent of territory, upon the mere face of tariffs, and without further proof.<sup>2</sup>

The fact that different rates and classifications are in force in different sections of the country will not of itself, without proof of unlawful discrimination or disadvantage or of unreasonably high rates, warrant an extension of the lower rate and classification to the section where the higher rate and classification are applied.<sup>3</sup> Competition of market with market, although it may not be so direct in its effect as competition of carrier with carrier, may constitute a part of the circumstances and conditions which a carrier can consider in fixing rates for the transportation of goods.<sup>4</sup> A higher rate may be maintained to a branch line point off a direct through line, without unjust discrimination.<sup>5</sup> A railroad cannot be said to discriminate against a town which it does not reach and in whose carrying trade it does not participate.<sup>6</sup> That a railroad company has at one point on its line issued through bills of lading to points beyond its own line confers no right on shippers at another point to demand that like bills of lading be issued to them.<sup>7</sup> It is often impracticable to establish different rates on the same commodity from practically the same locality to the same market, although the distances vary.<sup>8</sup>

The circumstances and conditions in the carriage of flour to

<sup>1</sup> *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203.

<sup>2</sup> *Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 193.

<sup>3</sup> *F. Schumacher Mill. Co. v. Chicago, R. I. & P. R. Co.* 4 Inters. Com. Rep. 373.

<sup>4</sup> *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332.

<sup>5</sup> *Lehmann v. Texas & P. R. Co.* 3 Inters. Com. Rep. 706.

<sup>6</sup> *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 65.

<sup>7</sup> *Coles v. Central R. & Bkg. Co.* 86 Ga. 251, 45 Am. & Eng. R. Cas. 328.

<sup>8</sup> *Coxe v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 460.

New York are substantially dissimilar at Boston and Readville, an interior town about 8 miles from Boston, on the line of the all-rail carriers, where no competition exists between the all-rail carriers and the water lines, and justifies the all-rail carriers in meeting the water rate at Boston by a joint through rate which is less from New York to Boston than the combined local rates to Readville.<sup>1</sup> The "blanket rate," by which the same rate is charged by all-rail lines from New York city and all points in the oil producing regions in Pennsylvania, Ohio, and West Virginia, and all the territory in the United States east of the 97th meridian of longitude, in the carriage of petroleum and its products, to San Francisco, Oakland, Sacramento, Stockton, Marysville, San Jose, Los Angeles, and San Diego, in the state of California, is a rate that has its origin in and is based upon actual competition for the carriage of this large traffic, on the one side by the all-rail lines, and on the other side by the lines part rail and part water, and also, in some instances, all water-lines, and also, in other instances, part pipe lines and part water lines, and it is not a violation of the Act to Regulate Commerce, § 4.<sup>2</sup> A group rate for a particular distance, upon a commodity for which a large demand exists, and intended to place producers in the district upon an equality among themselves and with producers of the same commodity from other districts, all competing in a common market, is not unlawful merely on account of differences in the geographical location of different producers and their respective distances from the market.<sup>3</sup> Actual undue prejudice or damage of which the rate is the cause must result to the more favorably situated producers, to render a group rate unlawful.<sup>4</sup>

Under exceptional circumstances requiring through rates *via* Chicago westward from points in a coal mining district extending across the whole state of Illinois, which is properly treated as one point in making rates, shippers locally, from Chicago, of Ohio

<sup>1</sup> *King v. New York, N. H. & H. R. Co.* 3 Inters. Com. Rep. 272.

<sup>2</sup> *Rice v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 263.

<sup>3</sup> *Imperial Coal Co. v. Pittsburg & L. E. R. Co.* 2 Inters. Com. Rep. 436; *Howell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162.

<sup>4</sup> *Imperial Coal Co. v. Pittsburg & L. E. R. Co. supra.*

and Pennsylvania coal, cannot justly insist upon rates no higher than the division of such through rates which appertains to the lines running northwest from that city,—the circumstances under which the through rate is made being such that it cannot be differently adjusted. A reduction of their rates on that basis would involve either a general reduction from the entire group, under the short haul clause of the Interstate Commerce Law, or an abandonment by defendant of the through rates in question, neither of which would benefit complainant, while both would do great injury to all other interests involved. Under such circumstances the preference is not undue, nor is the advantage complained of unreasonable. Group rates may be properly made from a large number of mines practically composing a coal mining district extending across the state of Illinois, to points in western Wisconsin, Minnesota, and Dakota, the distance from each part of the group by some route being substantially a fair equivalent of the distance from other points, and the commercial necessities being substantially the same for all. The group rate established from a coal mining district extending across the whole state of Illinois is properly extended to coal shipped to the same territory locally from Chicago, or by way of Chicago from mines in the eastern part of the group, on account of the operation of § 4 of the Interstate Commerce Act, some of the lines passing through the mining district *en route* from Chicago to the points of distribution.<sup>1</sup>

A uniform rate upon milk destined for New York city from all stations within 200 miles upon railroads running through the southern counties of New York, west of the Hudson river to Jersey City, is not an unjust discrimination in favor of more distant shipping points, as against those nearer the common terminus.<sup>2</sup> In the determination of a complaint of undue preference against Lincoln, Nebraska, in favor of Omaha, in rates from St. Louis, the comparative length of the two pieces of road, the grades, crossings, and bridges, the interest upon the cost, and the facilities with which trains may be handled, must be considered, besides

<sup>1</sup> *Rend v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 313.

<sup>2</sup> *Howell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162.

the mere volume of business.<sup>1</sup> There is no unjust discrimination in charging more to Boston than to New York in rates from Chicago.<sup>2</sup> The fact that a low rate from St. Louis is forced upon the Missouri Pacific by competition at Omaha cannot be taken advantage of to compel a corresponding reduction upon its Lincoln branch.<sup>3</sup>

The action of the Grand Trunk Railway Company of Canada in transporting coal and coke under a schedule specifying a total rate of \$1 per ton from Buffalo, Black Rock, and Suspension Bridge, in the United States, to Hamilton, Dundas, and several other points in Canada,—the published tariff rate,—but accepting a reduced charge, or allowing a rebate of 25 cents a ton, in favor of certain consignees at Hamilton, Dundas, and other points in Canada,—is in violation of the Act to Regulate Commerce, and unlawful.<sup>4</sup> And a higher rate on coal from Providence than from East Providence is an unjust discrimination, and under the circumstances it is not permissible to make an additional charge because of inconvenience attending transaction of business at East Providence.<sup>5</sup>

The danger from transportation of oil to Washington through the city of Pittsburg is not sufficient to justify a rate of 50 cents per barrel as against 40 cents for an equal distance to other places.<sup>6</sup> Transportation charges are required to be relatively reasonable as well as reasonable in themselves, to prevent unjust discrimination between localities. A locality not widely dissimilar in situation and in respect of the transportation service of the same carrier to other localities where lower rates are given, is entitled to rates that bear a just relation to the lower charges made. Equality in charges is required under circumstances and conditions substantially similar, and relative equality is necessary in the degree of similarity. When a carrier engages in transporta-

<sup>1</sup> *Lincoln Board of Trade v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 98.

<sup>2</sup> *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754; *Re Export Trade of Boston*, 1 Inters. Com. Rep. 25.

<sup>3</sup> *Lincoln Board of Trade v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 98.

<sup>4</sup> *Re Grand Trunk R. Co.* 2 Inters. Com. Rep. 496.

<sup>5</sup> *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>6</sup> *Brady v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 78.



tion for which, by reason of competitive conditions, or for purposes of its own, it receives low rates from some patrons and at some localities, it accepts the legal obligation to give impartial service to other patrons and at other localities that sustain similar relations to the traffic. The generally recognized principle that cost of carriage is in inverse ratio to distance, and that therefore the charge per ton per mile should diminish with distance, is not a rule required by the statute, and is subject to qualifications and exceptions. Upon complaint by dealers at Mankato, Minn., that rates from Chicago to Mankato should be no higher than to Waterville, Minneapolis, and points allowed like rates, it was held that in view of the circumstances and conditions existing, a somewhat higher charge to Mankato is not unlawful, but that a difference of twenty per cent or more on the respective classes, charged when the complaint was filed, is excessive, and that a difference of ten per cent on the several classes is reasonable and should not be exceeded.<sup>1</sup>

No dissimilarity in circumstances or conditions justifying a discrimination in rates exists between a shipment of cotton from Mobile to New Orleans by a person who receives it by vessel from Demopolis, Alabama, and a person who receives it from any other part of Alabama or by rail, where there is no question of a proportion of rates under a joint traffic arrangement. An agreement by a railroad company with other companies within a specified territory, for the purpose of maintaining a uniform rate upon all shipments of cotton from certain points in Alabama in vessels plying the Alabama rivers and received at Mobile, to be reshipped and transported to New Orleans, to charge a certain sum per bale in excess of its regular rate from Mobile, is no justification of such discriminating charge, and contravenes the Interstate Commerce Act. A person who receives cotton at Mobile from any particular point on the Alabama rivers, whether it comes by boat or wagon or any other way, and desires to ship it from Mobile to New Orleans by a railroad line, is entitled to have it shipped at the Mobile rate, as much as any person who receives

<sup>1</sup> *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115.

his cotton from any other point or who may have bought it at Mobile; and it is no objection to such right that it would give every town located on such rivers equal facilities and advantages with those of Mobile, as that is the purpose of the Interstate Commerce Act.<sup>1</sup>

A railway company must give equal facilities and similar rates to all persons in receiving and delivering goods.<sup>2</sup> In *McCoy v. Cincinnati, I. St. L. & C. R. Co.*, 13 Fed. Rep. 3, it was held that a railroad company was bound to transport over its road and deliver to all stockyards, at a certain point reached by its line, all livestock consigned which shippers desired to consign to them, upon equal terms and in like manner, and it cannot bind itself to perform this duty for one to the exclusion of another and competing yard; and in *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, it was held that a railroad, though owned by a corporation, is, in a qualified sense, a public highway constructed for public uses, and everybody constituting part of the public for whose benefit it was authorized is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. A discrimination in the rates of freight between the same points is unreasonable and unjust. Special tariffs giving different rates to places named and those not named, to manufactured articles named and those not named, to jobbers at places named and those not named, and to manufacturers and jobbers and other dealers, discriminate and give undue advantages.<sup>3</sup>

That a refusal to give a through rate as for one shipment operates prejudicially to the town desiring that privilege does not make the refusal an unjust discrimination, when the carrier applies the same rule to all towns. Discrimination must consist of allowing one party what is denied another. Carrier need not give the merchants of towns on its line the privilege of shipping their goods from the point of purchase to their own locality and from

<sup>1</sup> *Bigbee & W. R. Packet Co. v. Mobile & O. R. Co.* 4 Inters. Com. Rep. 829, 60 Fed. Rep. 545.

<sup>2</sup> *Cooper v. London & S. W. R. Co.* 4 C. B. N. S. 738, 27 L. J. C. P. 324; *Bell v. London etc. R. Co.* 2 Nev. & McN. 185.

<sup>3</sup> *Re Tariffs of Transcontinental Lines*, 2 Inters. Com. Rep. 203.

there to the place of sale of the goods, at the same rate as would have been charged from the point of purchase to the point of ultimate delivery.<sup>1</sup> The difference between proportions of through rates along the same lines should be fairly reasonable in amount and properly guarded in their application, and not such as to injure or suppress business in one locality in order that it may be stimulated and built up in another.<sup>2</sup>

In determining the question of undue prejudice from a rate, distance is only one of the factors, and other material facts—such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity, and its market cost,—are to be considered.<sup>3</sup> Under Illinois Statutes (2 Starr & C. p. 1962, § 3) it is not incumbent to prove a personal discrimination and a personal injury, as between individuals of a class; but the offense is made out by proof of a discrimination as between localities.<sup>4</sup> Rates must be relatively fair and reasonable as between localities in essential respects similarly situated, having regard to the geographical position and relative positions of the localities, so that one will not be favored to the prejudice of the other.<sup>5</sup> On the question of what are just and fair rates to any particular locality, it is necessary to see what other rates are given to other localities. Low rates to one place may not be just if still lower rates are given to another.<sup>6</sup>

The relative reasonableness of rates from western points to Atlantic seaboard is governed by circumstances and conditions affecting traffic to points between which rates are given. The length and character of the haul, the cost of the service, the volume of the business, and the conditions of competition, etc.,

<sup>1</sup> *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>2</sup> *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.* 2 Inters. Com. Rep. 393.

<sup>3</sup> *Imperial Coal Co. v. Pittsburg & L. E. R. Co.* 2 Inters. Com. Rep. 436.

<sup>4</sup> *Illinois Cent. R. Co. v. People*, 121 Ill. 304.

<sup>5</sup> *Detroit Board of Trade v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 199; *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.* 2 Inters. Com. Rep. 393; *Re Tariffs of Transcontinental Lines*, 2 Inters. Com. Rep. 203.

<sup>6</sup> *Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 137.

are elements bearing upon such charges.<sup>1</sup> A system of rates made by a number of carriers, covering a widely extended territory, and relatively fair and reasonable in themselves, will not be ordered by the Interstate Commerce Commission to be changed at one important point, thereby rendering other changes unavoidable at other points and throwing the entire system into confusion, unless this is necessary to be done in order to enforce compliance with the law.<sup>2</sup>

### § 124. *Discrimination between Shippers—Rebate.*

In some of the cases it is said that upon the question whether the common law requires the common carrier to transport goods upon equal terms to all, or whether it only requires that the rate shall be reasonable but not necessarily equal to all, the courts of England and America have decided differently.<sup>3</sup> The Supreme Court of California has declared that at common law an action will lie against a common carrier for an unreasonable and excessive freight charge, but not for a mere discrimination in favor of another shipper.<sup>4</sup> The same rule is declared in *Avinger v. South Carolina R. Co.* 29 S. C. 265, although this was not necessary to the decision, which was that a carrier cannot discriminate between shippers in taking freight for transportation. In *Fitchburg R. Co. v. Gage*, 12 Gray, 393, it is said that the common law requires equal justice to all but the equality is in a right to a reasonable compensation, and that, "for specified reasons in isolated cases" the carrier may give lower rates to one than to another. So in *Spofford v. Boston & M. R. Co.* 128 Mass. 326, substantially the same doctrine is held under the Massachusetts statute requiring "reasonable and equal terms," and it is held that one purchasing a season ticket at an established and reasonable price cannot com-

<sup>1</sup> *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 154.

<sup>2</sup> *Detroit Board of Trade v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 199.

<sup>3</sup> *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684.

<sup>4</sup> *Cowden v. Pacific Coast SS. Co.* 18 L. R. A. 221, 94 Cal. 470. This right is also alleged to exist in *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Menacho v. Ward*, 27 Fed. Rep. 529; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564.

plain because for special reasons not disclosed such tickets are sold to certain persons at a less price.

The fact that a trader has access to a competing route for the carriage of goods may be taken into consideration by the English Railway Commissioners or the court, in determining whether lower rates charged him by a railway company constitute an undue preference within the English Railway & Canal Traffic Acts of 1854 and 1888, giving a right of action to one injured by such preference.<sup>1</sup> Different rates may be charged where shippers own private side tracks and return cars more promptly.<sup>2</sup> A difference in the cost of service will justify a carrier in making a reasonable difference in its rates.<sup>3</sup> The difference in rates must bear some proportion to the difference of the cost to carriers.<sup>4</sup> Less rates may be charged for furnishing freight in fully loaded trains at regular intervals.<sup>5</sup> A difference in charge is justified where the transportation is over steep grades.<sup>6</sup> A difference in bulk will justify difference in rates.<sup>7</sup> Or difference in expense of loading and unloading.<sup>8</sup> Or when return loads could not be had.<sup>9</sup>

<sup>1</sup> *Phipps v. London & N.W. R. Co.* [1892] 2 Q. B. 229.

<sup>2</sup> *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 11 App. Cas. 102, L. R. 10 H. L. 97, 26 Am. & Eng. R. Cas. 293.

<sup>3</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 11-24, 16 Am. Rep. 599; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* *supra*; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 63, 1 C. B. N. S. 437, 2 Nev. & McN. 202; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291; *Ransome v. Eastern Counties R. Co.* *supra*; *Foreman v. Great Eastern R. Co.* 2 Nev. & McN. 202; *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39; *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 105; *Bell v. London etc. R. Co.* 2 Nev. & McN. 185; *Holland etc. R. Co. v. Festiniog R. Co.* 2 Nev. & McN. 287; *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306, 18 Am. & Eng. R. Cas. 490; *Burton Stock Car Co. v. Chicago, B. & Q. R. R. Co.* 1 Inters. Com. Rep. 329; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>4</sup> *Harris v. Cockermouth & W. R. Co.* 1 Nev. & McN. 97-102, 3 C. B. N. S. 693; *Garton v. Bristol & E. R. Co.* 1 Nev. & McN. 227, 6 C. B. N. S. 639-655; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 185; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* *supra*; *Buxendale v. Bristol & E. R. Co.* 1 Nev. & McN. 202; *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 69.

<sup>5</sup> *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366.

<sup>6</sup> *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 105; *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39.

<sup>7</sup> *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306, 18 Am. & Eng. R. Cas. 490.

<sup>8</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 26, 16 Am. Rep. 599.

<sup>9</sup> *Chicago & A. R. Co. v. People*, *supra*; *Girardot v. Midland R. Co.* 4 Ry. & Canal Traffic Cas. 291.

Railroads have a right to grant special privileges to religious teachers.<sup>1</sup> Where a railway company, with a purpose of obtaining a greater remunerative profit by the diminished cost of carriage, transports for a lower rate in consideration of a guarantee of large quantities, and full train loads at regular periods, the 2d section of the English Railway & Canal Traffic Act is not contravened, although the effect may be to exclude from the lower rates such persons as cannot give such a guarantee.<sup>2</sup>

A common carrier may discriminate in the rates of freight, between customers not in like conditions, if the discrimination be fair and reasonable and not inconsistent with the public interest. Discriminating in favor of persons living at a distance from the end of the route, for the purpose of securing freight which would otherwise pass over a different route, is permissible; and if the charges made against other persons, not in like conditions, are reasonable, they leave no cause of complaint for discrimination.<sup>3</sup> Independent of statute, railway companies are held to a strict impartiality in the conduct of their business, in withholding all privileges or preferences from one customer, which are not extended to all others. But, where the rate of freight is reasonable for all customers, contracts for a less rate may be made in special cases, when—under all the circumstances—the discrimination is reasonable and just. The discrimination must not subject others to unreasonable disadvantages, nor must the purpose be to give one individual the preference to the disadvantage of another; or to give preference or advantage to one locality to the disadvantage of another locality. The rule may be stated, that the mere discrimination in favor of a customer, is not lawful unless it is an unjust discrimination.<sup>4</sup>

The tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a quasi public duty to transport merchandise on equal terms for all parties, where the carrying for some shippers at a lower price than for

<sup>1</sup> *Re Religious Teachers*, 1 Inters. Com. Rep. 21.

<sup>2</sup> *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 121.

<sup>3</sup> *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684.

<sup>4</sup> *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98.

others will create monopoly by injuring or destroying the business of those less favored. "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry, under the same conditions for others, is void, as creating an illegal preference."<sup>1</sup> The Chief Justice, in the last case cited, page 410, says: "It cannot be denied that at common law every person under identical conditions, had an equal right to the services of these commercial agents. It was one of the primary obligations of the common carrier, to receive and carry all goods offered for transportation, upon receiving a reasonable hire. If he refused the offer of such goods he was liable to an action, unless he could show reasonable ground for his refusal. Thus, in the very foundation and substance of the business, there was an inherent rule which excluded a preference of one consignor of goods over another. The duty to receive and carry was due to every member of the community, an in an equal measure to each. Recognizing this as the settled doctrine I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons, for an identical kind of service under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment. A person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all; and therefore to permit the common carrier to charge various prices according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. The law that forbids him to make any discrimination in favor of the goods of A, over the goods of B, when the goods of both are tendered for carriage, must, as it seems to me, necessarily forbid any discrimination with respect to the rate of pay for carriage. The rule that the carrier shall receive all the goods tendered, loses half its value as a politic regulation, if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of the other."

The same questions came up on error after issue had been

<sup>1</sup> *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457.

joined and a trial had below, and are reported in *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754. And Judge Beadle, speaking for the court, says, on p. 534: "The business of the common carrier is for the public, and it is his duty to serve the public indifferently. In the very nature then of his duty, and of the public right, his conduct should be just and equal to all. So also there is involved in the relationship of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances, is most unreasonable and unjust when the right to demand it is common. A direct refusal to carry for a reasonable rate would involve the carrier in damages; and a refusal in effect could be accomplished by unfair and unequal charges. A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences, and thereby prevent or impair the enjoyment of the common right." In *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599, Lawrence, Ch. J., affirms: "Another perfectly well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust and injurious discrimination between individuals in their rates of toll. Transportation to the public is necessarily open upon equal and reasonable terms."<sup>1</sup>

In discussing the English "equality statute" before adverted to, Beasley, Ch. J., pronouncing the opinion of the supreme court of New Jersey, says: "But the courts of Pennsylvania have repeatedly declared that this act was but declaratory of the doctrine of the common law." And in a more recent decision Mr. Justice Strong says that the special provisions which are sometimes inserted in railroad charters in restraint of undue preference are "but declaratory of what the common law now is." This is the view which, for reasons already given, seems correct."<sup>2</sup>

The supreme court of New Hampshire in *McDuffee v. Portland & R. R. Co.*, 52 N. H. 447, 13 Am. Rep. 72, in an action for damages for refusing to carry freight for the plaintiff at the same rate and with like facilities granted to others, says: "A

<sup>1</sup> *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195.

<sup>2</sup> See *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 513.



common carrier is a public carrier. He engages in a public employment; takes upon himself a public duty and exercises a sort of public office. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right." Again, on page 450, the court says: "Equality, in the sense of freedom from unreasonable discrimination, being of the very substance of the common right, an individual is deprived of his lawful enjoyment of the common right when he is subjected to unreasonable and injurious discrimination in respect to terms, facilities or accommodations." On page 451, the court further says: "The common and equal right is to reasonable transportation service for a reasonable compensation. Neither the service nor the price is necessarily unreasonable because it is unequal in a narrow, strict and literal sense. The question is not whether the service or price is absolutely unequal in the narrowest sense, but also whether the inequality is unreasonable and injurious." On page 453, the court, in discussing the case of *Garton v. Bristol & E. R. Co.*, 1 Best & S. 112, *et seq.*, where it was not found that any unreasonable inequality had been made by the defendant to the detriment of the plaintiffs, says: "It was held that a reasonable price paid by them was not made unreasonable by a less price paid by others," but the court continues: "But before that conclusion is reached, it may be necessary to determine whether the receipt of a less price from another person was a matter of charity or an unreasonable discrimination, and a violation of the common right. Charging A less than B for the same service is not necessarily charging A too little or charging B too much; but it may be evidence tending to show that B is charged too much, either by being charged more than the actual value of the service, or being made the victim of an unjustifiable discrimination. . . . If an apparent discrimination is found to have been a real one, the question is whether it was reasonable; and, if unreasonable, whether the party complaining was injured by it." To similar effect are cases in other states.<sup>1</sup>

<sup>1</sup> *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Menacho v. Ward*, 27 Fed. Rep. 529.

So, it is said that a railroad company is not obliged as a common carrier to transport goods and merchandise for all persons at the same rates.<sup>1</sup> Mere inequality between the rate charged a shipper and the published tariff rates does not constitute unjust discrimination, within the meaning of Colo. Const. art. 15, § 6, prohibiting "undue or unreasonable discrimination."<sup>2</sup> At common law, a carrier may contract to ship freight at a lower rate than the published tariff, but not to deny the same reduced rate to other shippers.<sup>3</sup> Discrimination in freights, if fair and reasonable, founded on grounds consistent with public interests, is allowable.<sup>4</sup> To charge one a rate less than the regular fixed rate is not discrimination. To charge one a higher rate than the lowest rate given to any one else, under certain circumstances, is discrimination.<sup>5</sup> A contract to carry freight for a party at a specific rate, being less than its published schedule, is not void as being an unjust discrimination and against public policy, in the absence of evidence that such special rate is not an exclusive privilege.<sup>6</sup> A contract in restraint of trade to the injury of others and tending to monopoly, extortion and oppression, is void as against public policy.<sup>7</sup>

Where a railroad corporation, as a common carrier of freight, in consideration of the fact that the shipper furnish a greater quantity of freights than other shippers during a given term, agrees to make rebate on the public tariff on such freights to the prejudice of other shippers of like freights under the same

<sup>1</sup> *Fitchburg R. Co. v. Gage*, *infra*.

<sup>2</sup> *Bayles v. Kansas Pac. R. Co.* 2 Inters. Com. Rep. 643, 5 L. R. A. 480, 13 Colo. 181.

<sup>3</sup> *Christie v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 22, 94 Mo. 453.

<sup>4</sup> *Schofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

<sup>5</sup> *McNees v. Missouri Pac. R. Co.* 22 Mo. App. 224.

<sup>6</sup> *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Ex parte Benson*, 18 S. C. 39, 44 Am. Rep. 564; *Avinger v. South Carolina R. Co.* 29 S. C. 265; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Christie v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 22, 94 Mo. 453; *Bayles v. Kansas Pac. R. Co.* 2 Inters. Com. Rep. 643, 5 L. R. A. 480, 13 Colo. 181. Upon the question whether a railroad company may, in the absence of legislation, agree upon different rates of compensation for similar services, for different persons, examine *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Spofford v. Boston & M. R. Co.* 128 Mass. 326; *Ragan v. Aiken*, *supra*.

<sup>7</sup> *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103.

circumstances, the contract is an unlawful discrimination in favor of the larger shipper, and tends to create a monopoly, destroy competition, injure, if not destroy, the business of smaller operators, and is, therefore, contrary to public policy.<sup>1</sup> The evidence was in substance that one E. R. Clapp was an employe of the defendant. He was located at Des Moines, and was known among shippers of live stock as the Iowa stock agent of the defendant. Clapp was frequently along the railroad in conference with shippers of live stock. He held this position during the time that the plaintiffs made the shipments set forth in their petition. There were a number of shippers of live stock in and about Newton, the principal station on the defendant's road in Jasper county. During nearly the whole time covered by this action, the tariff rate for shipment of live stock from Newton to Chicago was \$60 per carload. It was practically the same from the stations next east and west of Newton. There was at times a slight difference, but not enough to be a material fact in the case. The freight charges, as given by the defendant to its station agents, were for the most of the time \$60 per carload, and this rate was given out by station agents to shippers as the charge made by the defendant. All of the carloads sent forward by all the shippers were billed by the agents at the full rate given out by the company. The stock was shipped in the usual manner. No part of the freight charges were in any case paid at the place of shipment. The cars were billed to commission houses at the Union Stock Yards. The stock was sold by the commission men, and, after taking out their commission and paying the freight, the balance of the proceeds of the sales was remitted to the shipper. This was the uniform manner of transacting the business. All of the shippers were dealt with in exactly the same manner until the stock was sold and the regular freight charges paid. There was no difference in the manner of the service. All of the shippers were given the same kind of cars, and the stock shipped by the plaintiffs was conveyed in the same kind of trains, and on the same time, and with the same privileges as to the free transportation of one or more men to take care of the stock while in

<sup>1</sup> *Seofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

transit. In short, the plaintiffs had no preference over other shippers in any respect. It appears without conflict that at least three other firms or individuals engaged in the same business at the same place, and in competition with the plaintiffs, had private and secret agreements with Clapp, the said stock agent, by which they were paid a rebate of from \$3 to \$20 on each carload shipped. These agreements were not uniform at all times. The amount to be paid varied just as the parties were able to agree upon the terms. So far as appears, Clapp always performed the contracts. He paid the rebates sometimes in currency; at other times by sending the money to the shippers by express. There were short intervals during the time that no rebates were paid. But these intervals were the exception and not the rule. And Clapp always exacted a promise from the favored shippers that the fact of the payment of rebates must be kept secret. No exact estimate could be made from the evidence. It is shown, however, beyond all question, that not less than 1800 carloads, in the aggregate, were shipped by the favored shippers. The plaintiffs made application to Clapp for better terms, and were refused. He invariably stated in most positive terms that no rebates nor concessions were allowed to any of the plaintiffs' competitors. The referee found that the plaintiffs were entitled to recover on part of the shipments at the rate of \$3 per car, and on others at \$5, and on the remainder at the rate of \$10 per car. The aggregate amount found to be due, including interest, was \$2733.98. If the plaintiffs are entitled to recover on the ground of unjust discrimination, the evidence shows beyond all controversy that the judgment is not excessive. The real question in the case is, Do the facts above recited authorize a recovery on the part of the plaintiffs? It is well to keep in mind the fact that the defendant is a public common carrier. At common law a public or common carrier is bound to accept and carry for all upon being paid a reasonable compensation. The fact that the charge is less for one than another is only evidence to show that a particular charge is unreasonable.

In Story on Bailments, § 508, note 3, it is said: "There is nothing in the common law to hinder a carrier from carrying for

avored individuals at an unreasonably low rate, or even *gratis*." And in 1 Wood, Railway Law, 566, it is said: "A mere discrimination in favor of a customer is not unlawful unless it is an unjust discrimination." In volume 2, p. 95, Redfield on Railroads, the following language is used: "It has been held in this country, where there is no statutory regulation affecting the question, that common carriers are not absolutely bound to charge all customers the same price for the same service. But as the rule is clearly established at common law that a carrier is bound by law to carry everything which is brought to him, for a reasonable sum to be paid to him for the same carriage, and not to extort what he will, it would seem to follow that he is bound to carry for all at the same price, unless there is some special reason for the distinction. For, unless this were so, the duty to carry for all would not be of much value to the public, since it would be easy for the carrier to select his own customers at will by the arbitrary discrimination in his favor. Hence, it was held at an early day that all that could be required on the part of the owner of the goods, by way of compensation, was that he should be ready and willing to pay a reasonable compensation, and to deposit the money in advance, if required. Carrying for reasonable compensation must imply that the same compensation is accepted always for the same service, else it would not be reasonable, either absolutely or relatively."

The court reached the conclusion from an examination of the authorities that a common carrier has no right to make unreasonable charges for his services, and that he cannot lawfully make unjust discrimination between his customers. It is distinctly averred in the counts that the rate charged the plaintiffs "was unreasonable, and is and was an unjust discrimination." This appears to be a sufficient answer to any claim that can be made that the action is founded solely upon the fact of mere difference in rates. It must be conceded that the defendant had no right to exact unreasonable rates or to make unjust discriminations between shippers which in effect compels one shipper to pay an unreasonable rate. This principle of law may be said to be fundamental, and it is only necessary to apply the facts to reach the

conclusion that the rates paid by the plaintiffs were unreasonable and unjust discrimination. It is not claimed that the favored shippers were objects of the charity of the defendant. The payment of the rebates cannot be designated as "alms giving." It does not appear that the concessions were made because the favored shippers furnished more shipments than the plaintiffs. The fact is that some of the others shipped less than the plaintiffs. In short there is no reason for the discrimination. It is true that it is claimed that the rebate shippers bought cattle and hogs from territory in which shipments would ordinarily be made upon other railroads, but the court find that the evidence shows that the plaintiffs' field of operation was about the same as the other shippers'. It does not appear that the rebates were allowed merely at times when there were cut rates or a war of rates between the defendant and rival railroad lines. The rebates were paid regularly for years, with but short intervals. Under these facts the question is suggested whether it is to be supposed that any court or jury under this state of facts would find that, after paying the rebate, the defendant did not have a reasonable compensation for the service? The only finding it is said that can in any fairness be made is that, after deducting the rebate, the rate was reasonable; and that the exaction from the plaintiffs was unreasonable, and the discrimination against them unjust. And the fact that it was secretly done, and that it appeared to be necessary to carry it on by lying and deceit, surely does not tend to commend such a course of dealing to fair minded men.<sup>1</sup>

The cases of *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731, and *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564, have often been relied on, together with the doctrine so frequently found in the books, declaring that common carriers are to be held to a reasonable compensation, but not necessarily an equal compensation. In the latter case a petition was filed against the receiver of a railroad to compel him to pay to a shipper out of the "receiver's fund," an amount that had been prom-

<sup>1</sup> See, in support of this conclusion, *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457.

ised as a drawback to procure his custom as a cotton shipper. The receiver contested the claim on the ground that the discrimination was unlawful; but no person was shown to have been injured by and no third person was complaining of the discrimination. Under that state of facts, the shipper had judgment for his drawback. In the Florida case the discrimination was made in favor of a shipper of lumber who, under peculiar circumstances, had furnished the railroad company a sum of money to complete its road, and was to have the loan repaid by freight at a reduced rate. Complaints of loss and injury were made by another shipper, but there was no proof or no satisfactory evidence to show the complaining shipper was injured in his business by the lower rate given to the other shipper. In both these cases reliance is placed on the doctrine that discrimination is not necessarily unlawful and all that the freighter is entitled to is a reasonable rate not necessarily equal to all; and in the absence of any statute to the contrary, perhaps it is unnecessary to question the correctness of these decisions.

It would seem, however, that all the cases that have been referred to, on their facts, might be harmonized by observing the distinction so often alluded to, that is to say, that as between a consignor and the common carrier, where no other reason intervenes to engraft an exception on the rule, all the consignor can demand of the common carrier is that his goods shall be carried at a reasonable rate, not necessarily at an equal rate with all others. But when the reduced rate is either intended to or has a natural tendency to injure the plaintiff in his business and destroy his trade, then a necessary exception is engrafted on the more general rule, and the plaintiff has then the right to insist that rates to all be made the same for goods shipped "under like circumstances." Excessive charges do not constitute "undue or unreasonable preference or advantage" in favor of any particular person, company, or traffic, within the meaning of the statutory inhibition. The words quoted refer exclusively to preference or advantage as between competing parties.<sup>1</sup> Although the original

<sup>1</sup> *Reg. v. Railway Comrs. & D. Iron Co.* L. R. 22 Q. B. Div. 642, 40 Am. & Eng. R. Cas. 59.

charge may have been a reasonable toll, it straightway became unreasonable and an extortionate one when a less rate was granted to the competitor for one and the like service under similar conditions.<sup>1</sup> All special stipulations inserted in the charter of the common carrier for the purpose of securing equal rights to all shippers affirm nothing more than the common rights to equal justice, which exist independently of such provisions.<sup>2</sup> Carriers cannot discriminate unjustly for the same service and under like conditions between their local patrons.<sup>3</sup> The common law prohibits extortionate rates and unjust discriminations, and requires that the carrier shall demand only a reasonable compensation and treat competing shippers alike, and prevents their making unjust discriminations; and the fact that the high rate charged was not unreasonable does not affect the discriminations.<sup>4</sup>

Leaving out of view the question of favor shown to a competitor, the proposition may be admitted that the important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality has been made to his detriment. In *Johnson v. Pensacola & P. R. Co.*, 16 Fla. 623, 26 Am. Rep.

<sup>1</sup> *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, 37 N. J. L. 531, 18 Am. Rep. 754; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Olcott v. Banfill*, 4 N. H. 537; Story, Bailm. § 508; *Holford v. Adams*, 2 Duer, 471; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378, 64 Am. Dec. 667; *Cumberland Valley R. Co.'s App.* 62 Pa. 218; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98; *Merriam v. Hartford & N. H. R. Co.* 20 Conn. 354, 52 Am. Dec. 344; *Jordan v. Fall River R. Co.* 5 Cush. 69, 51 Am. Dec. 44; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *McDuffee v. Portland & R. R. Co.* 52 N. H. 445, 13 Am. Rep. 72; *Sloan v. Pacific R. Co.* 61 Mo. 24, 21 Am. Rep. 397; Pierce, Railroads, 498; *Cole v. Goodwin*, 19 Wend. 261, 32 Am. Dec. 470; *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613, 33 Am. Rep. 70; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650, and note; Brown, Carr. 82.

<sup>2</sup> *Sandford v. Catawissa, W. & E. R. Co.* *supra*; *Sharpless v. Philadelphia*, 21 Pa. 169, 59 Am. Dec. 759; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, *Shipper v. Pennsylvania R. Co.*, *Houston & T. C. R. Co. v. Rust*, *New England Exp. Co. v. Maine Cent. R. Co.*, *McDuffee v. Portland & R. R. Co.* and *Messenger v. Pennsylvania R. Co.* *supra*.

<sup>3</sup> 1 Wood, Railway Law, 565, 566.

<sup>4</sup> *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 57.



731, the court says: "Most of the cases treat the common law rule strictly as between the parties and without comparison as to the charges against others."

In *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348, the action was on contracts made with the railroad company, wherein it undertook to transport grain from Indianapolis to the seaboard; and the charge is that the carrier agreed to receive at the time of the shipments a designated sum as compensation for the transportation of the grain and to refund to the shippers a certain part of the sum received. The demand is that the carrier be compelled to respond in damages for a breach of the agreement to refund part of the money paid to it as freight on the grain carried under the contracts. As a first cause of action it is alleged that on the 15th day of September, 1884, the railroad company made a contract with Closser & Co. wherein it agreed to transport grain from Indianapolis to Philadelphia "at the price of 16½ cents per hundred weight, at the same time stipulating that Closser & Co. should pay the defendant at the rate of 21 cents per hundred weight, but should be entitled to a rebate of 4½ cents per hundred, to be repaid to Closser & Co. promptly after such shipments."

The contract described is adjudged valid. It is not, it is said, different in any material respect from the ordinary one in which the carrier stipulates directly to carry goods at a fixed rate, for the agreement to repay does not of itself change the legal effect of the undertaking to such an extent as to transform it into an illegal contract. It is, in contemplation of law, nothing more than an agreement to carry the grain at the compensation ultimately agreed upon, inasmuch as the provision binding the carrier to pay back part of the nominal compensation simply fixes the amount of the actual and final compensation, although it does provide for a peculiar mode of payment. There is no element of moral or legal wrong in an agreement to repay part of the compensation received; to give an illegal character to such an agreement more must be shown than the mere fact that the parties stipulated for a rebate. In simply making a rebate, and in providing for a drawback, parties violate no law and their contract must

stand. It cannot be presumed that fraud was intended or practiced, nor can it be presumed that there was any wrongful combination to secure an undue advantage over other shippers; neither can it be presumed that in stipulating for a rebate the carrier intended to make in favor of the particular shipper a discrimination forbidden by law.\* The opinion is expressed that it is not necessarily or *per se* a legal wrong for a carrier to give better rates to one who ships many carloads of grain than to one who ships a single carload or a single bushel. It is said to be a matter of common knowledge, and therefore one of which judicial notice is taken, that an increase in the volume of business is desirable and advantageous, and in the rivalry of business competition it is lawful to favor those whose business is great rather than those whose business is small or inconsiderable. In the case of *Nicholson v. Great Western R. Co.*, 4 C. B. N. S. 366, 1 Nev. & McN. 121, Erie, Ch. J., said: "I take the free power of making contracts to be essential for the purpose of making commercial profits. Railway companies have that power as free as any merchant, subject only (as to this court) to the duty of acting impartially, without respect of persons, and this duty is performed when the offer to contract is made, to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of some whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

It is obvious that whether the common carrier acts impartially or not depends upon the circumstances of the particular case, for regard must be had to such circumstances as quantity, distance and kindred considerations. The hinge of the the question is not

\* NOTE.—But it is by no means every favor shown a particular shipper, although it may constitute in some measure a discrimination favorable to him and unfavorable to other shippers, that impresses upon a contract for the carriage of goods the seal of condemnation. The common law authorities fully support the doctrine that a mere discrimination will not invalidate a contract. To have that effect other elements must enter into the contract; but when such elements are present in such force as to make the discrimination unjust or oppressive the contract will be illegal.

found in the single fact of discrimination, for discrimination without partiality is inoffensive and partiality exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing. Many English cases support this general doctrine.<sup>1</sup> The current of judicial opinion in America it is said flows in the general channel marked out and opened by the courts of England.<sup>2</sup> The cases of *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130; *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846, and *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, are not entirely out of line on a careful and critical examination of the opinion, with the decisions to which reference has been made, although fragmentary expressions found in some of the opinions seemingly pass the lines of principle. It is very doubtful indeed whether the reasoning in the case of *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 31 Fed. Rep. 652, can be regarded as sound, or be made to harmonize with the reasoning in what appears to be the much more carefully considered case of *Interstate Commerce Com. v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192; but, granting the reasoning to be unimpeachable and the conclusion sound, the decision cannot be regarded as of controlling influence in such a case as the one then at bar. In that case, the recovery was

<sup>1</sup> *Garton v. Bristol & E. R. Co.* 1 Best & S. 112; *Hazier v. Caledonian R. Co.* 1 Nev. & McN. 29; *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 238; *Ransome v. Eastern Counties R. Co.* 1 C. B. N. S. 437; *Jones v. Eastern Counties R. Co.* 1 Nev. & McN. 45; *Oslade v. North Eastern R. Co.* 1 C. B. N. S. 454; *Baxendale v. Great Western R. Co.* 5 C. B. N. S. 336; *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 105.

<sup>2</sup> *Bayles v. Kansas Pac. R. Co.* 2 Inters. Com. Rep. 643, 5 L. R. A. 480, 13 Colo. 181; *Spofford v. Boston & M. R. Co.* 128 Mass. 326; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 632, 26 Am. Rep. 731; *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *McDuffie v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Christie v. Missouri Pac. R. Co.* 2 Inters. Com. Rep. 22, 94 Mo. 453; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67; *Erie & P. Despatch v. Cecil*, 112 Ill. 185; *Root v. Long Island R. Co.* 4 L. R. A. 331, 2 Inters. Com. Rep. 576, 114 N. Y. 300; *Killmer v. New York Cent. & H. R. Co.* 100 N. Y. 395, 53 Am. Rep. 194; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *Union Pac. R. Co. v. United States*, 117 U. S. 355, 29 L. ed. 920; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Interstate Commerce Com. v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192.

adjudged on the ground that the difference in the rate charged shippers of large quantities of goods and that charged shippers of small quantities was so gross as to be against public policy. This question did not arise in the Indiana case. So far as concerns the question of the right to discriminate between shippers the Indiana court concur with the general doctrine that an unjust, unfair or oppressive discrimination is prohibited by the soundest considerations of public policy, but, it denies that from the sole fact that there is a discrimination a conclusion can be inferred which invalidates the special contract between the carrier and the shipper, on the ground that to warrant such a conclusion the discrimination must be unjust or oppressive.

In the later case of *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505, the decision in *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, is explained, and it was said: "The contract held invalid in *Messenger v. Pennsylvania R. Co. supra*, was indeed one inuring to the benefit of the individual and against the corporation; but its terms were such that it could not possibly be effectuated without giving the plaintiff a preference over the public; it was, in effect, that whatever rate should be charged against any one else, 20 per centum less should be charged against the plaintiff. Plainly, such a contract was not consistent with the company's duty of impartiality. As soon as the general rates were reduced to the standard of the plaintiff's he was entitled to have his rates reduced 20 per centum lower." It would seem to be a fair conclusion from this that the courts of New Jersey did not hold, or mean to hold, that a contract giving a special rate and providing for a drawback was, in itself, illegal and void. The decision in the case of *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, is founded upon an express statute and proceeds upon the assumption that the discrimination was an unjust one. Whether that case does or does not overrule the earlier cases decided by the same court, the reasoning in the earlier cases, it appears, harmonizes with the doctrine of the standard authorities. Those cases assert that a preferential rate, although made effective by a provision for a drawback, does not, of its own force, destroy the contract; but, where a preferential rate is given, the fact that

a drawback is provided for may exert an important influence upon the decision of the question whether the discrimination is or is not an unjust one, and may be considered in connection with other facts as tending to show an unjust discrimination. The conclusion that common carriers may, within the limits of fairness and impartiality, consult their own interests, underlies the decisions which have been cited.<sup>1</sup> Upon the question of the right to regulate the rate of charges for carriage by the quantity of the single or gross shipment, the American authorities do not fully harmonize.<sup>2</sup>

In the case of *Hays v. Pennsylvania Co.*, 12 Fed. Rep. 309, decided by Baxter, J., in the Circuit Court of the United States for the Northern District of Ohio, the judge on motion for a new trial said: "The defendant is a common carrier by rail. Its road, though owned by the corporation was nevertheless constructed for public uses, and is, in a qualified sense, a public highway. Hence, everybody constituting a part of the public for whose benefit it was authorized is entitled to an equal and impartial participation in the use of the facilities it is capable of affording. The discrimination complained of rested exclusively on the amount of freight shipped by the respective shippers during the year. Ought a discrimination resting exclusively on such a basis to be sustained? If so, then the business of the country is in some degree, subject to the will of railroad officials; for if one man engaged in mining coal and dependent on the same railroad for transportation to the same market, can obtain transportation thereof at from 25 to 50 cents per ton less than another competing with him in business, solely on the ground that he is able to furnish and does furnish the larger quantity for shipment, the small operator will sooner or later, be forced to abandon the unequal contest and surrender to his more opulent rival. If the principle is sound in its application to rival parties, engaged in mining

<sup>1</sup> *Louisville, N. A. & C. R. Co. v. Flanagan*, 133 Ind. 488; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 94; *Easton v. Houston & T. C. R. Co.* 32 Fed. Rep. 893; *Glasgow & S. W. R. Co. v. MacKinnon*, L. R. 11 App. Cas. 386, 27 Am. & Eng. R. Cas. 1; *Mogul S.S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, 39 Alb. L. J. 50.

<sup>2</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

coal, it is equally applicable to merchants, millers, dealers in lumber and grain, and to everybody else interested in any business requiring any considerable amount of transportation by rail; and it follows that the success of all such enterprises would depend as much on the favor of railroad officials as upon the energies and capacities of the parties prosecuting the same. It is not difficult, with such a ruling, to forecast the consequences. The men who control railroads would be quick to appreciate the power with which such a hold would invest them, and it may be, not slow to make the most of their opportunities; and perhaps tempted to favor their friends to the detriment of their personal or political opponents, or demand a division of the profits realized from such collateral pursuits as could be favored or depressed by discriminations for or against them; or else, seeing the augmented power of capital, organize into overshadowing combinations and extinguish all petty competition, monopolize business, and dictate the price of coal and every other commodity to consumers. We say these results might follow the exercise of such a right as is claimed for railroads in this case. But we think no such power exists in them; they have been authorized for the common benefit of everyone, and cannot lawfully be manipulated for the advantage of any class at the expense of any others. Capital needs no such extraneous aid. It possesses inherent advantages which cannot be taken from it. But it has no just claims, by reason of its accumulated strength, to demand the use of the public highways constructed for the common benefit of all on more favorable terms than are accorded to the humblest of the land, and a discrimination in favor of parties furnishing the largest quantity of freight and solely on that ground, is a discrimination in favor of capital, and is contrary to a sound public policy, violative of that equality of right guaranteed to every citizen, and a wrong to the disfavored party, for which the courts are competent to give redress."

Where a fuel company, seeking to occupy undeveloped coal fields, and to monopolize the market, agreed to furnish four hundred cars to a railroad company seeking to increase its transportation business, and entered into a contract which provided that

the railroad company should maintain a rate of \$2.40 per ton on all coal shipped when the amount is less than 100,000 tons, and that the rate for 100,000 tons or more shall be \$1.60 in summer and \$1.65 in winter, it was held that, on the face of it, such a discrimination was against public policy, the discrimination being based, not upon the cost of transportation, and upon the time, labor, and annoyance which may result to the railroad company, but solely upon the amount of transportation.<sup>1</sup> The relative quantity of freight shipped by different persons does not differentiate the service performed by common carrier. And it is unjust discrimination to base the rate of freight charges to several shippers upon the quantity shipped by each.<sup>2</sup>

The difference in the quantity of shipments is an insufficient and unwarrantable reason for discrimination in rates.<sup>3</sup> Nor can the carrier discriminate against small shippers in favor of larger shippers of the same class of goods solely on the ground of the difference in quantity.<sup>4</sup> Unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage, by a carrier, involves the question whether the service was rendered under substantially similar circumstances and conditions. More traffic furnished by one than by the other does not render them dissimilar; and it is for the jury to say whether a difference of 12 cents per 100 pounds between a local rate of a carrier and its proportion of a through rate, including another road, was unreasonable.<sup>5</sup>

The allowance of a rebate by a common carrier to certain of his customers from the tariff rates charged other customers for precisely similar services is sufficient of itself to show that the rates charged the latter were unreasonable, and that there was unjust discrimination against them, illegal by the common law, which will give the latter a right to recover the amounts paid by

<sup>1</sup> *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 31 Fed. Rep. 653.

<sup>2</sup> *Kinsley v. Buffalo, N. Y. & P. R. Co.* 3 Inters. Com. Rep. 318, 37 Fed. Rep. 181; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>3</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 540.

<sup>4</sup> *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Nicholson v. Great Western R. Co.* 4 C. B. N. S. 366; *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465.

<sup>5</sup> *United States v. Tozer*, *supra*.

them in excess of the rates charged the former, after deducting the rebates, under some authorities.<sup>1</sup>

A difference in rates upon carloads and less than carloads of the same merchandise between the same points of carriage, so wide as to be destructive to competition between large and small dealers, especially upon articles of general and necessary use, and which, under existing conditions of trade, furnish a large volume of business to carriers,—is unjust. A difference in rate for a solid carload of one kind of freight from one consignor to one consignee, and a carload quantity from the same point of shipment to the same destination, consisting of like freight, or freight of like character, from more than one consignor to one consignee, or from one consignor to more than one consignee,—is not justified by the difference in cost of handling.<sup>2</sup>

The double aspect in which a case of discrimination is to be viewed is well stated in the case of *St. Louis, A. & T. H. R. Co. v. Hill*, 14 Ill. App. 579, Baker, J., "The statement that one is a common carrier *ex vi termini*, imports a duty to the public and a corresponding legal right in the public; a right common to all. One of the duties imposed upon a common carrier is that he is bound to carry for a reasonable remuneration, and is not allowed to make unreasonable and excessive charges. He cannot, like a merchant or mechanic, consult his pleasure or caprice in the conduct of his business, and cannot, even by special agreement, receive an excessive and extortionate price for his services. Another duty imposed on him is to make no unjust, injurious or arbitrary discriminations between individuals in his dealings with the public. The right to the transportation services of the carrier is a common right belonging to every one alike." Of a like tenor and effect is *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684, where the question as to statutory regulation and the rules of the common law were before the court. The railroad company or its manager, to induce parties doing business in a particular locality, and who could send by a different route, offered to carry their

<sup>1</sup> *Cook v. Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, 2 Inters. Com. Rep. 383, 81 Iowa, 551.

<sup>2</sup> *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742.



goods for 15 cents per hundred. They accepted the proposition and shipped accordingly. The complainants were charged more, as were the balance of the public along the line of the road. They charged that this discrimination was illegal, and, for their relief, prayed an injunction. The court says (p. 617) "Railroad companies, as *quasi* public corporations, exercising franchises in consideration of accommodations afforded the public, are required, and may be compelled by the courts to afford reasonable and impartial facilities for transportation. Their charges, when not regulated by charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable."<sup>1</sup>

If only a maximum limit of charges be fixed by charter, the reasonableness of other charges within the limit may be tested in the courts. If the charge for each service be fixed by law or, if the intention of the legislature is clear, to allow only certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract. The court further says: "The question is whether defendant can make such contract under the circumstances," and decide as follows: "The English authorities hold that, at common law, the common carrier is not bound to carry at equal rates for all customers in like condition." It is competent for the carrier to make terms for its transportation.<sup>2</sup> The authorities are collected in *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72, and in *Dinsmore v. Missouri, K. & T. R. Co.* 3 Am. & Eng. R. Cas. 602.

In this country the courts have generally inclined to hold that statutes prohibiting discrimination are merely declaratory of the common law.<sup>3</sup> Discrimination in rates of freight, if fair and reasonable, and founded on grounds consistent with public inter-

<sup>1</sup> *Munn v. Illinois*, 94 U. S. 113, 133, 24 L. ed. 77, 86; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Reg. v. Grand Junction R. Co.* 4 Q. B. 16.

<sup>2</sup> *Pardington v. South Wales R. Co.* 1 Hurlst. & N. 396; *McManus v. Lancashire & Y. R. Co.* 4 Hurlst. & N. 347; *Curr v. Lancashire & Y. R. Co.* 7 Exch. 711.

<sup>3</sup> *Union Pac. R. Co. v. United States*, 99 U. S. 719, 25 L. ed. 501; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Shippen v. Pennsylvania R. Co.* 47 Pa. 338.

est, are allowable.<sup>1</sup> The important point to every freighter is that the charge shall be reasonable, and a right of action will not exist in favor of any one unless it be shown that unreasonable inequality had been made to his detriment. A reasonable price paid by such a party is not made unreasonable by a less price paid by others. In determining whether a company has given undue preference to a particular person, the court may look to the interests of the company.<sup>2</sup>

As a general proposition, where a railroad company is not restricted or inhibited by its charter or the law of the land, it is not unlawful for it to make an arrangement of rates for special purposes, on a sufficient consideration and for the legitimate increase of its business.<sup>3</sup> In other words, if the charge on the goods of the person complaining is reasonable, and such as the company would be required to adhere to, as to all persons in like condition, it may, nevertheless, lower the charge to another person, if it be to the advantage of the company, not inconsistent with the public interest and based on a sufficient reason.

Common carriers, as one of their primary obligations, must receive and carry all goods offered for transportation, upon receiving a reasonable hire. If the carrier refuses the offer of such goods, he is liable to an action unless he can show a reasonable ground for his refusal. The duty to receive and carry is due to each member of the community, and in an equal measure to each. Nothing can be clearer than in giving effect to this principle, a common carrier cannot agree to carry one man's goods in mere preference to those of another.<sup>4</sup> A majority of the recent cases hold that at common law a carrier cannot unjustly discriminate in rates between persons in the same circumstances.<sup>5</sup>

<sup>1</sup> *Hersh v. Northern Cent. R. Co.* 74 Pa. 181; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Fitchburg R. Co. v. Gage*, 12 Gray, 393.

<sup>2</sup> *Ransome v. Eastern R. Co.* 1 C. B. N. S. 437.

<sup>3</sup> *Missouri Pac. R. Co. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 428, 30 Fed. Rep. 2.

<sup>4</sup> *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457.

<sup>5</sup> *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L. R. A. 106, 132 Ind. 517; *Root v. Long Island R. Co.* 2 Inters. Com. Rep. 576, 4 L. R. A. 331, 114 N. Y. 300; *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348; *Cook v. Chicago, R. I. & P. R. Co.* 2

Statutes prohibiting discrimination between shippers or passengers have been held to be merely declaratory of the common law.<sup>1</sup> Some of the cases without positively limiting the extent to which discrimination in rates is unlawful hold that it is so where it is unjust and tends to build up the business of one shipper at the expense of another.<sup>2</sup> In *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562, it is said, though not necessarily decided, that rates charged by a carrier must be uniform although special favor may be shown to individuals or classes by carrying them free or for half price. So in *Christie v. Missouri Pac. R. Co.*, 2 Inters. Com. Rep. 22, 94 Mo. 453, it is held that the illegality of rebates to shippers depends on the exclusiveness of such privilege. A contract for the monopoly of transportation of certain kinds of freight is illegal.<sup>3</sup> A carrier cannot arbitrarily refuse to carry a passenger over a line in which it is transporting other passengers as a common carrier.<sup>4</sup> And a carrier has no right to discriminate by selling tickets to some persons and not to others.<sup>5</sup> Neither can a railroad company refuse to sell to a particular person a commutation ticket such as it sells to people generally.<sup>6</sup> Neither is discrimination allowed between shippers to the prejudice of one as to forwarding their property.<sup>7</sup> It is unlawful for a railroad company to discriminate unjustly between two rival lines of steamboats.<sup>8</sup> It must be admitted, however,

Inters. Com. Rep. 383, 9 L. R. A. 764, 81 Iowa, 551; *Fitzgerald v. Grand Trunk R. Co.* 3 Inters. Com. Rep. 633, 13 L. R. A. 70, 63 Vt. 169; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754, affirming 36 N. J. L. 407, 13 Am. Rep. 457; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 543; *Hays v. Pennsylvania R. Co.* 12 Fed. Rep. 309.

<sup>1</sup> *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122, 47 Am. Rep. 181.

<sup>2</sup> *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130; *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

<sup>3</sup> *Union Locomotive & Exp. Co. v. Erie R. Co.* 37 N. J. L. 23.

<sup>4</sup> *Wheeler v. San Francisco & A. R. Co.* 31 Cal. 46, 89 Am. Dec. 147.

<sup>5</sup> *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293.

<sup>6</sup> *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 59 Am. Rep. 543.

<sup>7</sup> *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525, 59 Barb. 104; *Avinger v. South Carolina R. Co.* 29 S. C. 265.

<sup>8</sup> *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 67.

that courts of law in England have recognized the rights of carriers to regulate their charges with reference to the quantity of merchandise carried by the shipper, either at the beginning of shipment or during a given period of time, although public sentiment in many communities is repugnant to such discriminations and has crystallized into legislative condemnation of the practice. By the English statute (17 & 18 Vict. chap. 31) railway and canal carriers are prohibited from giving "any undue or unreasonable preference or advantage to or in favor of any particular description of traffic in any respect whatsoever," in the receiving, forwarding, and delivering of traffic; but under these provisions of positive law the courts have held that it is not an undue preference to give lower rates for larger quantities of freight.<sup>1</sup> These decisions proceed upon the ground that the carrier is entitled to take into consideration the question of his own profits and interests in determining what charges are reasonable.<sup>2</sup> In many cases it has been held that the customer was only entitled to have his goods shipped at a reasonable rate and not necessarily at an equal rate with others, and that he was not interested in the matter that somebody else was charged less, or, in the incisive language of Crompton, J., to counsel in the English case, "The charging another person too little is not charging you too much."<sup>3</sup>

As far as the common law is concerned, the question as to an alleged discrimination by a carrier in rates is whether the rate to the complaining party is reasonable or not.<sup>4</sup> But a railway company acting as a common carrier, and bound by statute to deal equally with all persons, cannot make a regulation for the conveyance of goods which in practice affects one individual only.<sup>5</sup> The question, so far as it related to railroads, was settled by statute

<sup>1</sup> *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 63; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 121; *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245; *Greenock v. Southeastern R. Co.* 2 Nev. & McN. 319.

<sup>2</sup> *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. ed. 77, 87.

<sup>3</sup> *Garton v. Bristol & E. R. Co.* 1 Best & S. 112, 154, 163; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72.

<sup>4</sup> *Missouri Pac. R. Co. v. Texas & P. R. Co.* 4 Inters. Com. Rep. 428, 30 Fed. Rep. 2.

<sup>5</sup> *Crouch v. London & N. W. R. Co.* 14 C. B. 255; *Morgan v. Pike*, 25 Eng. L. & Eq. 287. See *Crouch v. Great Northern R. Co.* 34 Eng. L. & Eq. 572.

in England shortly after their introduction there under the "equality clause." By the English statute railroad companies were bound to charge equally to all persons in respect to all goods under like circumstances.<sup>1</sup> And by 17 & 18 Vict. chap. 31, §§ 2, 3, 6, the court of common pleas was empowered to restrain by injunction any railroad or canal company from giving undue or unreasonable preference to any particular person, or description of traffic.<sup>2</sup> So for a long period of time, the English courts have had no occasion to examine the condition of the common law upon the subject, independent of the statute.<sup>3</sup> In England the question of discrimination by a railroad company between its patrons has long been regulated by statute, which secures substantial equality in the service.<sup>4</sup>

The recent decisions strongly tend to deny the right of a carrier to ruin or injure one man's business and build up that of his rival by discrimination in rates, and to this extent it seems safe to say the weight of authority restricts discrimination, but, on the other hand, it seems to be a fair implication from a majority of the decisions that a carrier may, in the absence of statutory restriction, show special favor to particular individuals by carrying them or their goods free or for less than the usual reasonable rates, so long as it is merely a matter of favor to those individuals and works no injury to others.

Carriers are bound to carry indifferently within the usual range of their business, for a reasonable consideration, all freight offered. For similar equal services they are entitled to the same compen-

<sup>1</sup> *Pickford v. Grand Junction R. Co.* 10 Mees. & W. 399; *Baxendale v. London & S. W. R. Co.* L. R. 1 Exch. 137; *London & N. W. R. Co. v. Evershed*, 26 Week. Rep. 863.

<sup>2</sup> See note to *Coggs v. Bernard*, 1 Smith, Lead. Cas. 369.

<sup>3</sup> For discrimination by a railroad company between express companies wishing to do business over its line and in general for the right to compel service by a carrier or other party whose business it is to serve the public, see note to *Rushville v. Rushville Nat. Gas. Co.* (Ind.) 15 L. R. A. 321.

<sup>4</sup> *Ransome v. Eastern Counties R. Co.* 1 C. B. N. S. 437; *Oxluide v. Northeastern R. Co.* 1 C. B. N. S. 454, 26 L. J. C. P. 129; *Baxendale v. Eastern Counties R. Co.* 4 C. B. N. S. 61; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639; *Branley v. Southeastern R. Co.* 12 C. B. N. S. 63; *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029.

sation, and no more, it is said, from one shipper than from another, nor can they give any preference in the order of transportation.<sup>1</sup> A common carrier cannot give any undue preference or advantage to any particular person, company, firm, corporation or locality,—or to any particular description of traffic in any respect whatsoever. He must know no friends to whom he concedes unequal and unjust favors. The opportunity for profit of a stranger in a single and unusual transaction should be held as important by the carrier as the traffic of a constant shipper; no preference should be given to either. It is the duty of a common carrier to provide adequate equipment for the business of his line; if in time of special pressure some one must wait, the annoyance must be distributed with all possible equality. It is in contravention of the statute for a common carrier to refuse a shipment upon the ground that regular patrons desire to use all the facilities at hand and to appropriate to the use of the latter the entire available equipment. Such a carrier cannot unreasonably discriminate as to whom it will serve.<sup>2</sup>

A common carrier of livestock is under obligation to furnish cars for such stock on reasonable notice, if with reasonable diligence it can do so without jeopardizing its other business as such common carrier.<sup>3</sup> A foreign as well as a domestic corporation is entitled to the protection of Me. Rev. Stat. chap. 51, § 134, requiring it to extend equal facilities to all persons or companies.<sup>4</sup> It is no proper business of a common carrier to foster particular enterprises, it is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.<sup>5</sup>

<sup>1</sup> *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *International Exp. Co. v. Grand Trunk R. Co.* 81 Me. 92; *Houston & T. C. R. Co. v. Smith*, 63 Tex. 322.

<sup>2</sup> *Bennett v. Dutton*, 10 N. H. 486; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754; *Cumberland Valley R. Co.'s App.* 62 Pa. 218; *Garton v. Bristol & E. R. Co.* 30 L. J. Q. B. 273; *Crouch v. London & N. W. R. Co.* 23 L. J. C. P. 73; *Crouch v. Great Northern R. Co.* 11 Exch. 742.

<sup>3</sup> *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

<sup>4</sup> *International Exp. Co. v. Grand Trunk R. Co.* 81 Me. 92.

<sup>5</sup> *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896.

Where the discrimination in the charges of freight to shippers is based solely on the amount of freight shipped, without reference to conditions tending to decrease the cost of transportation, such discrimination was held contrary to sound public policy, being in favor of capital.<sup>1</sup> In Illinois, the disposition in the railroads to discriminate seems to have taken the type of charging more to one warehouse than to another in the same city. And in *Vincent v. Chicago & A. R. Co.* 49 Ill. 33, it was decided: "A railroad will not be permitted to charge one rate of delivery to one warehouse and a different rate to another." In *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690, the application below was for mandamus to compel delivery of grain to the elevator to which it was consigned. On page 378 the court says: "Regarded merely as a common carrier at common law, and independently of any obligation imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself without the consent of every person who might call on it to perform them. Among these duties as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike without injurious discrimination as to the terms." In *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599, an information by *quo warranto* was filed below by the railroad warehouse commissioners against the railroad. On page 17 the court says: "Another perfectly well settled rule of the common law in regard to common carriers is that they shall not exercise any unjust and injurious discrimination between individuals in the rates of toll." In that court it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable.<sup>2</sup> If it shall in good faith, from a pressing cause, take grain from wagons or boats, while grain remains for shipment in private warehouses, it will not thereby incur liability. If by reason of bribes or other improper motives, railway em-

<sup>1</sup> *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309.

<sup>2</sup> *Chicago & A. R. Co. v. People*, *supra*; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33.

ployes give preference to one person over another, the company may be held liable for damages thereby sustained.<sup>1</sup>

A common carrier cannot, as a matter of discrimination in favor of any shipper, delay the transportation of goods already received, that he may accept and forward other goods.<sup>2</sup> Where a railroad company has fixed its rates for the transportation of grain, from any given station on the line of its road, to Chicago, it will not be permitted to charge one rate for delivery at the warehouse of one person, and a different rate for delivery at that of another, both houses being upon its line or side tracks.<sup>3</sup> Refusing to give one shipper the benefit of an unexpired contract for transportation at the old rates when advancing the rates for transportation on that class of freight, although unexpired contracts of other shippers are recognized and carried out, will render the carrier guilty of the statutory offense of unjust discrimination.<sup>4</sup> In Ohio, it was held that where a railroad company gave a lower rate to a favored shipper, with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances.<sup>5</sup>

A contract by a carrier to carry for one shipper at half the rate it agrees to charge all others for the same service, and to pay him half the amount charged and collected from such others, in consideration of his establishing a system of pipe lines to its road, is against public policy and void.<sup>6</sup> A corporation engaged in carrying goods for hire as a common carrier has no franchise, privilege or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the

<sup>1</sup> *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574.

<sup>2</sup> *Great Western R. Co. v. Burns*, 60 Ill. 284; *Chicago & A. R. Co. v. People*, 67 Ill. 11, 16 Am. Rep. 599; *Keeney v. Grand Trunk R. Co.* 47 N. Y. 525.

<sup>3</sup> *Vincent v. Chicago & A. R. Co.* 49 Ill. 33. See *People v. Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631.

<sup>4</sup> *Louisville, E. & St. L. Consol. R. Co. v. Crown Coal Co.* 43 Ill. App. 228.

<sup>5</sup> *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

<sup>6</sup> *Brundred v. Rice*, 49 Ohio St. 640.



avored shipper.<sup>1</sup> In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to who and what it will carry; that it cannot impose unreasonable or unequal terms, facilities or accommodations.<sup>2</sup> To similar effect are cases in other states.<sup>3</sup> In New York the authorities are exceedingly meager. The question was considered to some extent in the case of *Killmer v. New York Cent. & H. R. R. Co.* 100 N. Y. 395, 53 Am. Rep. 194, in which it was held that the reservation in the general act of the power of the legislature to regulate and reduce charges, where the earnings exceeded ten per cent of the capital actually expended, did not relieve the company from its common law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case, is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but, absolute equality cannot, in all cases, be required, for circumstances or conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted

<sup>1</sup> *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130.

<sup>2</sup> *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72.

<sup>3</sup> *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Shipper v. Pennsylvania R. Co.* 47 Pa. 333; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Menacho v. Ward*, 27 Fed. Rep. 529.

to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others; and in determining what would amount to unjust discrimination, all the facts and circumstances must be taken into consideration. This raises a question of fact which must ordinarily be determined by the trial court.

A common carrier may attach to a special rate for carriage of merchandise a condition that the consignor ship all his goods by the carrier's line; and the shipper has no cause to complain of discrimination if the same terms are offered to all shippers.<sup>1</sup> A contract for rebate in freight charges is not necessarily void as an unreasonable discrimination between shippers, as the same rebate may be made to all shippers.<sup>2</sup> A railway company is justified in carrying goods for one person at a less rate than that at which it carries goods for another only where there are circumstances which make the cost of carrying the former less than the cost of carrying the latter under some decisions.<sup>3</sup>

The difference in rates must bear some proportion to the difference in the cost to the carriers.<sup>4</sup> A difference in bulk will not justify difference in rates.<sup>5</sup> Or difference in expense of loading or unloading.<sup>6</sup> An agreement by a railroad company to transport coal at a specified rebate from regular tariff rates, in consideration of the shipper's erecting a dock and coal pockets on the company's land for use by both parties, is not, as matter of law, void because of unjust discrimination against other shippers,—especially where the shipper also agrees to do his own loading and to ship in large

<sup>1</sup> *Lough v. Outerbridge*, 68 Hun, 486; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 121, 5 C. B. N. S. 366, 7 C. B. N. S. 755.

<sup>2</sup> *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348, Feb. 5, 1894.

<sup>3</sup> *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639, 28 L. J. C. P. 306. 1 Nev. & McN. 218; *Oxlade v. Northeastern R. Co.* 1 C. B. N. S. 454, 26 L. J. C. P. 129. See 1 Inters. Com. Rep. 862.

<sup>4</sup> *Harris v. Cockermouth & W. R. Co.* 1 Nev. & McN. 97-102, 3 C. B. N. S. 693; *Garton v. Bristol & E. R. Co.* *supra*; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 185; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 122; *Baxendale v. Great Western R. Co.* 1 Nev. & McN. 202; *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 69.

<sup>5</sup> *Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306. See 1 Inters. Com. Rep. 862.

<sup>6</sup> *Chicago & A. R. Co. v. People*, 67 Ill. 26, 16 Am. Rep. 599.

quantities. The question of unjust discrimination is one of fact.<sup>1</sup> But a charge by a railroad company to one shipper of a larger amount than to another for the same service, under like circumstances, constitutes in Pennsylvania undue discrimination and renders the charge unreasonable.<sup>2</sup> To entitle a shipper to recover from a carrier for discrimination in rates, such discrimination must be made in respect to like service and under like conditions in all material respects.<sup>3</sup>

In *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, a bill was brought to enjoin defendant from refusing to plaintiff privileges granted to others. The court says, on page 380, "Transportation by a common carrier is necessarily open to the public on equal and reasonable terms." A railroad company may under Pa. Act June 4, 1883, prohibiting undue or unreasonable discrimination by railroad companies between shippers for a like service from the same place upon like condition and under similar circumstances, charge a lower rate of freight for coal transported to a factory from which it obtains manufactured products for shipments, than to a coal dealer whose business with it is limited to the transportation of the coal. The fact that a manufacturing company given a reduced rate on its coal sells some of the coal to its employes will not render the railroad company transporting the coal liable for unlawful discrimination under Pa. Act June 4, 1883, prohibiting undue or unreasonable discrimination for like services from the same place, upon like condition and under similar circumstances, where the company has no knowledge of such sales; but, upon being notified of such selling, the transporting company must cease to carry coal to the manufacturing company at any less rate than that charged to coal dealers or incur the penalties of unjust discrimination.<sup>4</sup> The fact that boards shipped are beveled on one edge and are prepared for being put together as troughs and are denominated "knock-down troughs" does not justify a

<sup>1</sup> *Root v. Long Island R. Co.* 2 Inters. Com. Rep. 576, 4 L. R. A. 331, 114 N. Y. 300.

<sup>2</sup> *Hoover v. Pennsylvania R. Co.* 156 Pa. 220.

<sup>3</sup> *Paine v. Pennsylvania R. Co.* 7 Kulp. 187.

<sup>4</sup> *Hoover v. Pennsylvania R. Co.* *supra*.

railroad company in giving the shipper a freight rate less than that charged the general public upon ordinary lumber.<sup>1</sup>

An alleged overcharge and discrimination on freight shipped from a point in Missouri to its destination in Texas, on a through bill of lading, is not within Tex. Rev. Stat. art. 4257, fixing a maximum rate of freight, and forbidding unjust discrimination and overcharge under penalty, although the entire haul of one of the connecting roads is in Texas; but the transaction constitutes an interstate shipment within the Act of Congress to regulate commerce.<sup>2</sup> A railway company is liable in an action to recover an excess of freight paid by a shipper, and for the statutory penalty for freight discrimination, where it frequently, about the time referred to, transported the same class of goods between the same points for other persons for much less per hundred weight in less than carloads than was charged plaintiff by the carload.<sup>3</sup> And it is decided in Nebraska that a railroad company may impose reasonable terms and conditions upon persons who erect elevators at stations on its line of road, but such conditions and terms must be the same to all such persons, and the State Board of Transportation, under the Nebraska act which took effect July 1, 1887, it is declared, may institute an action in a proper case to require a railroad company to furnish like facilities to erect an elevator at one of its stations to all persons engaged, or desiring in good faith to engage, in the business of receiving, handling, and shipping grain over the railway. Facilities for the erection of an elevator at a railway station need not necessarily be furnished by the carrier upon the right of way, but may be along the side thereof; but if such facilities are granted to one or more on the right of way, the same privilege upon like terms and conditions must be granted to others who desire in good faith to engage in the business of receiving, storing, and shipping produce at that point.<sup>4</sup>

Discrimination in the making of contracts by a carrier for the carriage of goods, without partiality, is inoffensive. Partiality

<sup>1</sup> *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685, 9 Ry. & Corp. L. J. 452.

<sup>2</sup> *Texas & P. R. Co. v. Clark*, 4 Tex. Civ. App. 611.

<sup>3</sup> *Galveston, H. & S. A. R. Co. v. Bowman* (Tex. Civ. App.)

<sup>4</sup> *State v. Missouri Pac. R. Co.* 29 Neb. 550, 42 Am. & Eng. R. Cas. 661.

exists only in cases where advantages are equal and one party is unduly favored at the expense of another who stands upon an equal footing.<sup>1</sup> A contract with a shipper, of such character as to destroy the business of his rivals by giving him a monopoly, is unjust without regard to the consideration upon which it is based. A railroad company cannot, it is said, discriminate for a shipper who furnishes a large amount of freight, over one engaged in the same business who is unable to furnish the same quantity—at least where both ship in carload lots.<sup>2</sup> The Constitution of Colorado, together with the corresponding statutes, prohibiting railroads from discrimination in freights is as follows: Constitution, art. 15, sec. 6: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employe thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

Session Laws of Colorado, 1885, page 309: "SEC. 7. (Unjust discrimination.) No railroad corporation shall, without the written approval of said commissioner, charge, demand, or receive from any person, company or corporation for the transportation of persons or property, or for any other service, a greater sum than it shall, while operating under the classification and schedule then in force, demand or receive from any other person, company or corporation for a like service from the same place, or upon like conditions and under similar circumstances, and all concessions of rates, drawbacks, and contracts for special rates shall be open to, and allowed all persons, companies and corporations alike, at the same rate per ton per mile, upon like conditions and under similar circumstances, except in special cases designed to promote the development of the resources of this state, when the approval of said commissioner shall be obtained in writing," etc.

<sup>1</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 26 Ind. 348.

<sup>2</sup> *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L. R. A. 105, 132 Ind. 517.

"SEC. 8. (Extortion.) No railroad corporation shall charge, demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the handling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a railroad corporation and not specified in the classification and schedule prepared and published by such railroad corporation. The superintendent, or other chief executive officer of each railroad in this state, shall cause to be kept posted up, in a conspicuous place in the passenger depot in each station where passenger tickets are kept for sale, a printed copy of the classification and schedule of rates of freight charges then in force on each railroad, for the use of the patrons of the road. Any railroad company violating any of the provisions of this section shall be deemed guilty of extortion and be subject to the penalties hereinafter prescribed."

The Supreme Court of the United States has decided that this law was intended to put all shippers on an absolute equality, saving only a power in the railroad commissioner in special cases. That a particular company is allowed by a railroad less rates than other shippers are required to pay, upon considerations which are satisfactory to the railroad, is no answer to a complaint of unlawful discrimination. It is not a justification for a violation by a railroad company of the law, by charging one coal company less rates for transportation than it charged plaintiffs, that it was done in consideration of the coal company selling coal to such railroad for its own use at a certain price, and of the compromise and settlement of a claim of the coal company against the railroad company. Under this law, the right of a railroad to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business.<sup>1</sup>

In *Cook v. Chicago, R. I. & P. R. Co.*, 2 Inters. Com. Rep. 383, 9 L. R. A. 764, 81 Iowa, 551, it is said that a common carrier cannot lawfully make unreasonable charges for his services,

<sup>1</sup> *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896.

or unjust discrimination between his customers.<sup>1</sup> The plaintiffs claimed unlawful and unjust overcharges upon the shipment of 316 earloads. Each shipment was pleaded in a separate count as a separate cause of action. All of the counts were alike except in dates of shipment, cars and kinds of stock shipped, and stations from which the shipments were made. It is averred, in substance, that the public tariff rates for shipment of livestock, from any point in Jasper county during the time the plaintiffs made such shipments, was \$66 for one earload. That the plaintiffs paid the full amount of said rates, and that certain other shippers (who are named in the petition) also paid the full tariff rates; but that said other shippers were allowed and defendant paid to them a rebate or drawback upon each earload shipped by them, which rebate or drawback was paid by defendant to said shippers, under a private and secret arrangement between the defendant company and said shippers; and that the knowledge of the payment of such rebates was wrongfully and fraudulently concealed from the plaintiffs by the defendant, and said other favored shippers. That the agents of the defendant openly announced and declared to the plaintiffs that the public and announced tariff paid by the plaintiffs was correct, and that no cut, rebate or concession from the same was allowed to any shipper, and that the plaintiffs, by reason of said wrongful and fraudulent agreement, did not and could not have discovered it, and they shipped their stock in the belief that no unjust discrimination was made against them. It is charged that the shipments made by the plaintiffs, and those made by the said favored shippers, were for precisely the same service, from the same places, upon like conditions and under precisely the same circumstances, and that the rate charged by the defendant and paid by the plaintiffs was unreasonable, extortionate and unjust, and that it was an unjust discrimination between shippers for the same service under like circumstances.

Equality in charges is required under circumstances and con-

<sup>1</sup> See *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457.

ditions substantially similar, and relative equality is necessary in the degree of similarity.<sup>1</sup> A contract of a railway company which gives to certain persons an exclusive advantage or monopoly over all other transporters in the transportation of goods is unjust and cannot be legally enforced.<sup>2</sup> Common carriers cannot make unreasonable discriminations or give undue preferences between persons applying to them for carriage either of passengers or goods, either in granting carriage to some and not to others, or in carrying for some for less rates than for others.<sup>3</sup> Nor can they discriminate against a local shipper by depriving him of any material advantage.<sup>4</sup> Nor can rates be given to one shipper and refused to another on capricious, arbitrary and unreasonable grounds.<sup>5</sup> The remedy against a railroad company for charging discriminating freights, where there is no adequate remedy at law, is by injunction.<sup>6</sup> A court of equity, to enforce statutes against discrimination, must be fully satisfied that its orders will not likewise work a discrimination.<sup>7</sup>

In the English courts it is ruled that a higher rate of freight upon a cross line, than is charged on the main line of a railroad, is not, under the English statute, an illegal discrimination.\* Where three firms were connected with another railway, and in order to secure a portion of their traffic, the defendant railway carted goods to its own railway practically free of charge, but refused to give such a privilege to the plaintiff engaged in the same business

<sup>1</sup> *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.* 3 Inters. Com. Rep. 115.

<sup>2</sup> *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754; *Union Locomotive & Exp. Co. v. Erie R. Co.* 37 N. J. L. 23.

<sup>3</sup> *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind. 293; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 497, 13 Am. Rep. 457; *Hays v. Pennsylvania Co.* 12 Fed. Rep. 311; *Com. v. Power*, 7 Met. 596, 41 Am. Dec. 465.

<sup>4</sup> *Ransome v. Eastern Counties R. Co.* 1 Nev. & McN. 109, 4 C. B. N. S. 135; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97.

<sup>5</sup> *Budd v. London & N. W. R. Co.* 25 Week. Rep. 752.

<sup>6</sup> *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

<sup>7</sup> *Chouteau v. Union R. & T. Co.* 22 Mo. App. 286.

<sup>8</sup> *Finnie v. Glasgow & S. W. R. Co.* 2 Macq. H. L. Cas. 177, 3 Macq. H. L. Cas. 75, 1 Patterson, 520.



as the three firms,—but who was not connected with either of the railways,—this gratuitous carting, loading and unloading of the goods for the three firms amounts to an inequality in favor of them, and the undue preference granted them by the defendant is in contravention of 8th & 9th Vict. chap. 20, § 90, and 17th & 18th Vict. chap. 31, § 2. And the plaintiff was entitled to maintain an action to recover the amounts paid by him to the defendant, which represented the cost of carting his goods between his premises and the station, and of loading and unloading the same.<sup>1</sup>

It is an undue preference for a railway company to permit a carrier, who also acts as superintendent of its freight transportation, to hold himself out as his agent for the receipt of goods to be carried on its line and to receive such goods, by requiring the shippers to sign conditions which are not exacted from other carriers bringing goods to its station.<sup>2</sup> A railway company must give equal facilities and similar rates to all persons in receiving and delivering goods.<sup>3</sup> Where the carrier is willing to afford the same facilities to others upon the same terms, special agreements giving such advantage in the transportation of goods are not illegal.<sup>4</sup> That the party is a customer of the railway company also in goods of a different kind, will not justify discrimination in his favor.<sup>5</sup> The agreement of the shipper that he will use other lines of the company, for the carriage of traffic distant and unconnecting with the goods shipped, is not a legitimate ground for giving a preference to such customer. A charge cannot be affected by the consent or declination of the shipper to bind himself to employ the company in other and totally distant lines of transportation.<sup>6</sup> A railway company required to charge "equally to all persons,

<sup>1</sup> *Evershed v. London & N.W. R. Co.* L. R. 3 Q. B. Div. 134, L. R. 2 Q. B. Div. 254, L. R. 3 App. Cas. 1029.

<sup>2</sup> *Barendale v. Bristol & E. R. Co.* 11 C. B. N. S. 787.

<sup>3</sup> *Cooper v. London & S. W. R. Co.* 4 C. B. N. S. 738, 27 L. J. C. P. 324, 1 Nev. & McN. 185; *Bell v. London etc. R. Co.* 2 Nev. & McN. 185.

<sup>4</sup> *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 121, 5 C. B. N. S. 266, 7 C. B. N. S. 755. See *Lough v. Outerbridge*, 68 Hun, 486; *Kansas Pac. R. Co. v. Bayles* 19 Colo. 348 Feb. 5, 1894.

<sup>5</sup> *Bellsdyke Coal Co. v. North British R. Co.* 2 Nev. & McN. 105.

<sup>6</sup> *Baxendale v. Great Western R. Co.* 5 C. B. N. S. 336.

etc., in all like circumstances," leasing another line not thus restricted, bound by the terms of release to pay to the lessee, a certain sum on all minerals carried by the latter, may charge for goods taken up by the main line and forwarded by the other, and goods carried entirely by the lessee according to different rates.<sup>1</sup>

The second section of the Interstate Commerce Act prohibits unjust discrimination and declares that the common carrier charging a greater or less compensation for any service rendered in the transportation of passengers or property than it charges any other person for doing a like and contemporaneous service in the transportation of a "like kind of traffic under substantially similar circumstances and conditions," shall be deemed guilty of unjust discrimination. The third section provides that it shall be unlawful for the carrier to make or give any undue or unreasonable preference or advantage to any particular person, locality, or particular description of traffic in any respect whatsoever, or to subject any particular person or locality or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The third section is substantially taken from the second section of the English Act of Parliament known as the Railway & Canal Traffic Act of 1854.

Either section is sufficiently comprehensive in its terms to prohibit an interstate carrier from making an unfair discrimination between different shippers in charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. But neither section is intended to prohibit all discriminations or preferences. In considering whether an undue discrimination has been made, the fair interests of the carrier are to be taken into account, and although lower rates are given to one shipper or class of shippers than to another for carrying the same kind of traffic, the latter have no just ground of complaint of unjust discrimination if the conditions of the service enable the carrier to take the traffic of the former at a less cost; nor is the discrimination unjust if made conformably to some agreement by which the favored shipper gives the carrier an adequate consideration for the reduced rates.

<sup>1</sup> *Finnie v. Glasgow & S. W. R. Co.* 2 Stuart, 195.

Upon this principle it was decided not to be an unjust preference under the English Act for a railway company to carry at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company was to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect might be to exclude from the lower rate those shippers who could not give such guarantee.<sup>1</sup> The discrimination between different shippers is a lawful one if it is such as the carrier may fairly give because of the difference in cost, expense or the exceptional character of the service.<sup>2</sup>

Prior to the enactment of the Interstate Commerce Act the courts were of the opinion that discriminations by railway carriers in the rates of freight charged to shippers based solely on the ground of the quantity of freight shipped, without reference to any conditions, tending to decrease the cost of transportation, were contrary to sound public policy and inconsistent with the obligations of such carriers to the public.<sup>3</sup> It might well be that shippers would be induced to increase their traffic with a carrier by the offer of such discrimination, perhaps by withdrawing part of it from a rival carrier, perhaps by stimulating the shipper to enlarge his business operations and thus the discrimination might be profitable to the carrier. The English courts, in cases arising under the English Traffic Act, have held that preferences given to particular shippers to induce them not to divert traffic from the carrier or to induce them to transfer traffic to one carrier which otherwise would go to another carrier, are unlawful and cannot be justified on the ground of profit to the carrier allowing them.<sup>4</sup>

In the first of these cases the judges in opinion pointed out that if they were to justify a discrimination upon such reasons a railway company might in any case grant a preference to one person

<sup>1</sup> *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366.

<sup>2</sup> *Morris v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617, 40 Fed. Rep. 101.

<sup>3</sup> *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309; *Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co.* 31 Fed. Rep. 652.

<sup>4</sup> *Harris v. Cockermouth & W. R. Co.* 3 C. B. N. S. 693; *Evershed v. London & N. W. R. Co.* L. R. 2 Q. B. Div. 254.

over another, provided it acted bona fide in the belief that such a course would be to its advantage. In the second case the court in pronouncing against the validity of the justification used this language: "We think that a railway company cannot, merely for the sake of increasing their traffic, reduce their rates in favor of individual customers, unless at all events there is a sufficient consideration for the reduction which shall lessen the cost to the company of the conveyance of their traffic or some other equivalent or other services are rendered to them by such individual in relation to such traffic." The Interstate Commerce Act would be emasculated in its remedial efficacy, if not practically nullified, if a carrier can justify a discrimination in rates merely upon the ground that unless it is given the traffic obtained by giving it would go to the competing carrier. A shipper having a choice between competing carriers would only have to refuse to send his goods by one of them unless given exceptional rates to justify that one in making the discrimination in his favor on the ground of the necessity of the situation.<sup>1</sup> The purpose of the Interstate Commerce Act requires, when circumstances will fairly admit of it, charges to all points for like service shall be made relatively equal. Discrimination must consist in allowing one party what is denied another.<sup>2</sup> "Any undue or unreasonable preference or advantage," within the meaning of the Act to Regulate Commerce, § 3, includes every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service.<sup>3</sup> The Interstate Commerce Act was not designed to prevent competition between different roads, nor to interfere with the customary arrangement made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the road. In order to constitute an unjust discrimination under section 2, of the Interstate Commerce Act, the carrier must charge

<sup>1</sup> *Interstate Commerce Com. v. Texas P. R. Co.* 4 Inters. Com. Rep. 115.

<sup>2</sup> *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>3</sup> *Morris v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617; *United States v. Tozer*, 2 Inters. Com. Rep. 597.

or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but, in either case, it must be for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.<sup>1</sup>

An advantage resulting from just rates coupled with the enterprise and outlay necessary to utilize them is legitimate, and carriers should not undertake to deprive a shipper of this advantage by a change of such rates.<sup>2</sup> The purpose of the Interstate Commerce Act requires that when circumstances will fairly admit of it, charges to all points for like service should be made relatively equal. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial.<sup>3</sup> Less desirable traffic must be accepted upon reasonable terms, as well as that which is more desirable.<sup>4</sup> "Goods of like description" and "goods of same description" refer not to the contents of the parcels, but to the parcels themselves—that is like or different for the purpose of carriage.<sup>5</sup> To render a preference of one over another unlawful, under the Act to Regulate Commerce, it is not necessary that it should be accomplished by any "device;" and it is equally true that the ingenuity of man cannot invent a "device" for the perpetration of an unlawful preference on the part of a carrier engaged in interstate commerce, without incurring the penalties prescribed by the statute.<sup>6</sup> The offense under the second section of the Act consists in charging, demanding, collecting or receiving by a common carrier to which the Act applies, from any person or persons, a greater or less compensation for service rendered or to be rendered, in the transportation of

<sup>1</sup> *Interstate Commerce Com. v. Baltimore & O. R. Co.* 4 Inters. Com. Rep. 92.

<sup>2</sup> *Potter Mfg. Co. v. Chicago & G. T. R. Co.* 4 Inters. Com. Rep. 223.

<sup>3</sup> *Creus v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

<sup>4</sup> *Riddle v. New York, L. E. & W. R. Co.* 1 Inters. Com. Rep. 787.

<sup>5</sup> *Great Western R. Co. v. Sutton*, L. R. 4 H. L. 226; *Nitshill, etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39; *Merry v. Glasgow R. Co.* 4 Ry. & Canal Traffic Cas. 383.

<sup>6</sup> *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67.

persons or property subject to the Act.<sup>1</sup> So, a discount allowed by a railroad company where consignments of coal in one year shall amount to 30,000 tons or upwards is an unjust discrimination.<sup>2</sup>

Violation by one carrier of principles governing relative rates on competitive articles does not justify similar violations by its competitors.<sup>3</sup> The fact that substantially dissimilar conditions create dissimilarity in rates does not render the amount of dissimilarity in the rates unimportant upon the question whether undue discrimination is exercised by a carrier.<sup>4</sup> Railway companies are only bound, under the Interstate Commerce Act, to give the same terms to all persons alike under the same conditions and circumstances; and any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge.<sup>5</sup> But the exercise by a railway company of the right to prepayment or to retain a lien upon the goods until payment is made, or to hold the consignee responsible in case of delivery before payment, or the waiver of some of such rights at different times, cannot be construed to be a denial of equal facilities or a discrimination.<sup>6</sup>

To constitute an unreasonable preference, there must be inequality in the charge for traveling over the same line, or the same portion of the line.<sup>7</sup> No device, such as payment of unreasonable rent for use of cars furnished by shippers, can be practiced to evade the duty of equal charges for equal service. And when a carrier engages in transporting oil in tanks, and also in barrels conveyed in box cars, in carloads, and charges for the weight of the barrel as well as the oil carried by the box-car mode

<sup>1</sup> *Griffie v. Burlington & M. R. R. Co.* 2 Inters. Com. Rep. 194.

<sup>2</sup> *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363.

<sup>3</sup> *Squire v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 515.

<sup>4</sup> *Interstate Commerce Commission v. Texas & P. R. Co.* 4 Inters. Com. Rep. 408, 57 Fed. Rep. 948.

<sup>5</sup> *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 49 Am. & Eng. R. Cas. 243.

<sup>6</sup> *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 59 Fed. Rep. 400.

<sup>7</sup> *Caterham R. Co. v. London, B. & S. C. R. Co.* 1 C. B. N. S. 410, 1 Nev. & McN. 32; *Finnie v. Glasgow & S. W. R. Co.* 2 Macq. H. L. Cas. 177, 26 L. T. 11.

of transportation, but for the weight of the oil only when carried in tanks, it unjustly discriminates between shippers, and subjects the traffic to undue prejudice and disadvantage.<sup>1</sup> It is the duty of the carrier to equip its road with the means of transportation, and, in the absence of exceptional conditions, those means must be open impartially to all shippers of like traffic. Ownership of a car rented to a carrier and for the use of which the carrier pays a full consideration, does not of itself entitle the owner to the exclusive use of such car, and, if the owner may in the contract of hire to the carrier stipulate for the exclusive use of the car, it must be upon such terms as shall not constitute an unjust discrimination against shippers of like traffic in cars owned by the carrier and who are excluded from the use of the car so hired.

Where oil is transported by the carrier both in barrels and in tank cars and the use of the tank cars is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shipper in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is a discrimination against the former in favor of the latter and illegal unless legal justification is shown. Two carloads of lumber need not be exactly of the same weight or dimensions, in order to make a charge of one rate per 100 pounds to the shipper of one, and of another rate to the shipper of the other an unjust freight discrimination, it being necessary only that the quantities shall be "like."<sup>2</sup>

Upon complaint alleging unjust discrimination against carload shippers of eggs in favor of shippers in less than carloads, it appeared that under the "official classification" eggs take second class rates for carload or less quantities; that the commodity is carried in refrigerator cars; that for carload shipments ice to the amount of 6000 pounds is furnished by the carrier without extra charge; that less than carload shipments are taken from local sta-

<sup>1</sup> *Independent Refiners Asso. v. Western New York & P. R. Co.* 4 Inters. Com. Rep. 162.

<sup>2</sup> *New York, T. & M. R. Co. v. Gallaher*, 79 Tex. 685.

tions in "pick-up" cars to distributing points and forwarded in carloads to New York and other large markets; that notwithstanding the special facilities afforded to small shipments by the carriers, the large dealers control 83 per cent of the traffic. Held, upon all the facts in the case, that no unjust discrimination results to the carload shipper from the equal rating of carload and less than carload lots and the special service rendered in gathering and forwarding small shipments, and the complaint should therefore be dismissed.<sup>1</sup>

The term "a like kind of traffic," as it occurs in the Act to Regulate Commerce, § 2, in respect to discrimination by carriers, does not mean traffic that is identical, but it means traffic that is of "a like kind" with other freight in the elements of a fair and just classification for the purpose of arriving at a just and reasonable rate and a rate that will avoid unjust discrimination and unlawful preference.<sup>2</sup>

If from peculiarity of traffic, carrier cannot supply stock, and consignors supply it for themselves carriers must not allow its deficiencies in this particular to be made means of putting at advantage those who make use in same traffic of facilities it supplies. Charge of transportation of oil in tank cars should be same as charged for transportation of barrel shipments of oil. That there are greater risks to carrier's property from such shipments does not justify greater charges therefor. Allowance can be made to owners of tank cars for their use. A carrier is not forbidden from obtaining cars from a shipper for the transportation of freight over its line, but in such case, after deducting reasonable rent published in the tariff as part of the rate and paid by the carrier to the shipper for the use of the cars, the rates must be actually the same as upon freight transported in the same service in the carrier's own cars. A carrier is not forbidden by the law from obtaining cars from other carriers, but the rates of freight must be exactly the same.<sup>3</sup>

<sup>1</sup> *Brownell v. Columbus & C. M. R. Co.* 4 Inters. Com. Rep. 285.

<sup>2</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

<sup>3</sup> *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67.



The fact that a carrier does not own tank cars, but accepts and uses such cars supplied by some of its patrons for their own traffic, is unimportant so far as rates are concerned. It is a carrier's duty to equip its road with instrumentalities of carriage suitable for the traffic it undertakes to carry, and to furnish them alike to all who have occasion for their use, and its duty to furnish equipment cannot be transferred to nor required of shippers. When a carrier accepts and uses cars for transportation owned by shippers or others, in legal contemplation it adopts them as its own for purposes of rates and carriage, and neither the manner of acquiring cars, nor inability to furnish its general patrons the use of cars similar to those furnished by some shippers for their own traffic, can excuse or justify a carrier for discrimination in rates that may give one shipper advantages over another; nor can any device, such as payment of unreasonable rent for use of cars furnished by shippers, be practiced to evade the duty of equal charges for equal service.<sup>1</sup>

A shipper is not entitled to have his cattle carried in cars of a special construction, belonging to a third party, and superior to ordinary cattle cars, by reason of the fact that the carrier transports some cattle in other cars available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road,—that of carrying coal,—when not in use for cattle. The refusal to use the cars desired by the shipper does not constitute unjust discrimination.<sup>2</sup>

A shipper from whose mill flour is taken in cars cannot complain that the carrier bears a portion of the cartage expenses of other millers.<sup>3</sup> Carrier, charged with unjust discrimination, may show that it made extra exertions in good faith to obtain cars for shipper from connecting line to whom shipper had to look for such cars. In absence of custom, carrier need not notify shipper

<sup>1</sup> *Rice v. Western New York & P. R. Co.* 3 Inters. Com. Rep. 162.

<sup>2</sup> *Morris v. Delaware, L. & W. R. Co.* 2 Inters. Com. Rep. 617.

<sup>3</sup> *Hezel Mill Co. v. St. Louis, A. & T. H. R. Co.* 3 Inters. Com. Rep. 701.

that it cannot obtain cars for his freight; it is the duty of the shipper to obtain this information for himself.<sup>1</sup> Carriers should so adjust rates between those who can and those who cannot furnish their own conveyance that there shall be no discrimination against the dependent shipper in the charges. The practice of allowing a tank shipper of oil an arbitrary deduction of 42 gallons per tank car is wholly indefensible, when no corresponding allowance is made for leakage and evaporation from shipments in barrels. An allegation of unjust discrimination resulting from shipments of oil in tank cars owned by the shipper, and low return rates on cotton-seed oil and turpentine in the same tanks, in connection with mileage paid for use of tank cars, cannot be sustained without evidence showing mutuality of interest between the two classes of shippers or the payment of excessive car mileage.<sup>2</sup>

A carrier that employs different methods for the transportation of petroleum oil and its products, in carloads,—for example, tank cars in which the oil is carried in bulk, and box cars in which the oil is carried in barrels,—is not relieved from its duty in respect to equality of rates by the difference it makes between its patrons in the mode of carriage, but its charges for like quantities carried between like points of shipment and destination must be equal upon the commodity itself, irrespective of the mode of carriage or the tank or barrel package in which it is contained. Differences in circumstances and conditions of transportation that are of a carrier's own creation or connivance, or that by reasonable effort on the part of a carrier might be avoided, cannot justify exceptional rates. When a carrier engages in transporting oil in tanks, and also in barrels conveyed in box cars, in carloads, and charges for the weight of the barrel as well as the oil carried by the box car mode of transportation, but for the weight of the oil only when carried in tanks, it unjustly discriminates between shippers, and subjects the traffic to undue prejudice and disadvantage.<sup>3</sup>

<sup>1</sup> *Riddle v. Baltimore & O. R. Co.* 1 Inters. Com. Rep. 778.

<sup>2</sup> *Rice v. Cincinnati, W. & B. R. Co.* 3 Inters. Com. Rep. 841.

<sup>3</sup> *Rice v. Western New York & P. R. Co.* 3 Inters. Com. Rep. 162.

The practice by a common carrier of arbitrarily determining what persons should receive a so-called "manufacturer's rate" is a violation of the Act to Regulate Commerce.<sup>1</sup> The provisions of the Interstate Commerce Law against undue discriminations in rates cannot be evaded by billing cars first to one point on the line of a railroad, and rebilling them to another point thereon at a different rate.<sup>2</sup> Any benefit in relation to the shipment of goods, having a definite money value, conferred gratis by the carrier upon one shipper and not conferred upon another, is an undue reduction in the price of carriage to the former, and is illegal under the Interstate Commerce Act, where the service to each is admittedly under substantially similar circumstances and conditions.<sup>3</sup> A carrier cannot pay the larger expense of the transportation of a remote shipper's merchandise to the station, and not pay the less expense of such transportation of the nearer shipper's merchandise.<sup>4</sup> To render a preference in rates unlawful, it is not necessary that it should be accomplished by any device.<sup>5</sup> A special tariff giving a class of persons from and to the same points rates less than one half those charged the general public in general tariffs, makes an unlawful discrimination.<sup>6</sup>

In proceedings to determine whether there has been discrimination in favor of a certain shipper, it is sufficient to show the rates actually charged, as differing from the public schedule of the rates charged to the public in general, for a reasonable length of time. Innumerable shipments in detail for many years are immaterial.<sup>7</sup> When rates on the line of a carrier are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them when challenged.<sup>8</sup> Underbilling weights of freight, whereby one person pays less compensation for like

<sup>1</sup> *Re Louisville & N. R. Co.* 4 Inters. Com. Rep. 157.

<sup>2</sup> *Osborne v. Chicago & N. W. R. Co.* 48 Fed. Rep. 49.

<sup>3</sup> *Interstate Commerce Com. v. Detroit, G. H. & M. R. Co.* 4 Inters. Com. Rep. 722, 57 Fed. Rep. 1005.

<sup>4</sup> *Hezel Mill Co. v. St. Louis, A. & T. H. R. Co.* 3 Inters. Com. Rep. 701.

<sup>5</sup> *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67.

<sup>6</sup> *Elvey v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 804.

<sup>7</sup> *Rice v. Cincinnati, W. & B. R. Co.* 2 Inters. Com. Rep. 584.

<sup>8</sup> *McMorran v. Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

services than another is within the inhibition of the Act.<sup>1</sup> Taking and billing freight between two points at lower rates, if it is destined to another point beyond the original destination, is giving an illegal preference.<sup>2</sup>

Discrimination in freight rates from Chicago to New York cannot be accomplished by a railroad company either (a) by applying a twenty-two cent through rate to freight originating west of Chicago on roads not in the arrangement and to which is paid more than its *pro rata* share of such rate to New York, or (b) by applying such rate to grain in store, by paying a "drawback" or "expense bill" based upon the fiction that the grain was still in transit on the twenty-two cent rate, thus bringing the shipper's rate from Chicago to New York down to eighteen and two tenths cents instead of the regular twenty cent rate.<sup>3</sup> Prescribing a minimum weight for a carload, and then charging by the hundred pounds in proportion to the car lot rate for any excess over the minimum, is not unlawful.<sup>4</sup>

Two west bound carload rates from Mississippi river points to Pacific coast terminals on goods termed "Emigrants Movables" (including "household goods")—one a general class rate; and the other designated a "commodity" rate and less than the general rate, being published as open to "intending settlers only," but in practice given to shippers indiscriminately, and not apparently unreasonable in itself—are improper, as their retention can only serve to mislead the public and afford opportunity for the practice of favoritism and unjust discrimination as between shippers; and the rate should not be in excess of the amount of said commodity rate.<sup>5</sup> Carriers may lawfully accept the same aggregate, though less profitable, rates for longer distances, provided they do not "subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."<sup>6</sup> A rate on

<sup>1</sup> *Re Underbilling*, 1 Inters. Com. Rep. 813.

<sup>2</sup> *Iowa Grain S. S. Asso. v. Chicago & N. W. R. Co.* 2 Inters. Com. Rep. 431.

<sup>3</sup> *United States v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 287.

<sup>4</sup> *Leonard v. Chicago & A. R. Co.* 2 Inters. Com. Rep. 599.

<sup>5</sup> *Duncan v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 385.

<sup>6</sup> *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.* 3 Inters. Com. Rep. 682.

wheat less than that on flour is unlawful if it works unjust discrimination, but is not otherwise.<sup>1</sup>

That a railroad company charges a shipper a greater rate for shipment from its terminal point to a point on its line than its proportion of a joint tariff on the same article under arrangement with another company does not violate the provision of the Interstate Commerce Act against preferential rates.<sup>2</sup> A discrimination between the rate on corn and its direct products, which subjected persons engaged in the business of manufacturing and selling such products to unreasonable prejudice or disadvantage; and which is without necessity or advantage to the carrier, or any reason founded on the character or condition of the traffic,—is in violation of the Act to Regulate Commerce, § 3, notwithstanding the rate on corn was open to all persons equally and with equal service.<sup>3</sup> Unlawful discrimination is not established by proof that a rate of freight on cotton from Vicksburg, Mississippi, to eastern points, is given to one different from that given to another, when it also appears that such rate is only a part of a uniform through rate from a point beyond.<sup>4</sup>

The provision of the third section of the Act to Regulate Commerce prohibiting carriers from making or giving any undue or unreasonable preference or advantage to any particular person, firm, company, corporation or locality, or any particular description of traffic, in any respect whatsoever, not only applies to relative rates on one description of traffic shipped to or from competing localities, but also to relative rates on differently described articles which are competitive in the same markets; and when carriers have established rates on articles of competitive traffic which are relatively reasonable and fair, they cannot arbitrarily select particular articles of such traffic and materially raise or lower rates so established thereon without violating that provision of the Statute.

The relation of rates ought to rest upon fixed and stable conditions. The fluctuations of markets are so frequent, especially as

<sup>1</sup> *Kauffman Mill Co. v. Missouri Pac. R. Co.* 3 Inters. Com. Rep. 400.

<sup>2</sup> *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. Rep. 917.

<sup>3</sup> *Bates v. Pennsylvania R. Co.* 2 Inters. Com. Rep. 715.

<sup>4</sup> *Cowan v. Bond*, 2 Inters. Com. Rep. 542.

to competitive articles, and oftentimes unexpected, that commercial considerations alone would not furnish a sufficiently stable and fixed rule for guidance in making a rate that should remain substantially permanent through all fluctuations. The Interstate Commerce Commission does not, by a fixing of rates, attempt to overcome advantages which one producer or dealer may have in his geographical location, and to produce equality between competitors in all markets. It would be a useless task, even if it had the power, to attempt to accomplish such a result. The proper relation of rates for transportation of strictly competitive articles over the same line should be determined by reference to respective costs of service ascertained with reasonable accuracy.<sup>1</sup> But while the interests of the carrier may be looked to, they must never be permitted to supersede or set aside the interest of the public or release the carrier from any duty owing to the shipper. A charter provision of a railroad, granting the power to take "tolls from all persons, property, merchandise and other commodities transported on their road, provided only the net profits of the road shall never exceed twenty-five per cent per annum," does not relieve the company from the obligation imposed upon a common carrier under the common law, as applied to common carriers by rail. The charter does not give the carrier an option to discriminate at will, provided only the net profits of the road do not exceed a certain limit.<sup>2</sup>

A corporation engaged in carrying goods for hire as a common carrier, has no franchise, privilege, or right to discriminate in its freight rates in favor of one shipper, even when it is necessary to do so to secure his custom, if the discriminating rate will tend to create a monopoly by excluding from their proper markets the products of the competitors of the favored shipper.<sup>3</sup> Railways cannot discriminate in favor of or against the traffic, because of its ultimate use.<sup>4</sup> Carriers must respect the interests of those who may have occasion to employ their services, and conform

<sup>1</sup> *Squire v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 515.

<sup>2</sup> *Samuels v. Louisville & N. R. Co.* 4 Inters. Com. Rep. 420, 31 Fed. Rep. 57.

<sup>3</sup> *State v. Cincinnati, W. & B. R. Co.* 7 L. R. A. 319, 47 Ohio St. 130.

<sup>4</sup> *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97; *Oxlade v. Northeastern R. Co.* 1 Nev. & McN. 72, 1 C. B. N. S. 454.

their charges to the rules of relative equality and justice.<sup>1</sup> An agreement by a railroad company to carry for one at a cheaper rate than for another is void,<sup>2</sup> and it is justified in carrying goods for one person at a less rate than that at which it carries goods for another, only where there are circumstances which make the cost of carrying the former less than the cost of carrying the latter.<sup>3</sup> Nor can it discriminate in favor of one local shipper and against his competitors, unless there be some substantial difference in the cost of the service.<sup>4</sup> The attempts by a receiver to accumulate money for the benefit of corporators or their creditors, by making one shipper pay tribute to his rivals in business, is a grossly illegal and inexcusable abuse of a public trust. Where the Standard Oil Company and one Rice, were competitors in the business of refining oil, and each obtained supplies from the same source, which were carried to Marietta or Cleveland, and both were equally dependent on the railroad in the hands of a receiver, and the Standard Oil Company, desiring to crush Rice, and under a threat of building a pipe for the conveyance of its oil, and withdrawing its patronage from the receiver, induced the latter to carry its oil at ten cents per barrel, and charge Rice 35 cents per barrel, and pay it 25 cents out of each 35 cents exacted from Rice, . . . the court removed the receiver, rescinded the contract, and directed proceedings to recover from the Standard Oil Company the amount it had received which had been collected from Rice.<sup>5</sup> A short road used by connecting interstate roads, must be accessible to interstate shippers, on equal and reasonable terms, and cannot be used to discriminate between mine owners on its line.<sup>6</sup>

<sup>1</sup> *Thurber v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 742.

<sup>2</sup> *Scotfield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 54 Am. Rep. 846.

<sup>3</sup> *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639, 28 L. J. C. P. 306, 1 Nev. & McN. 218; *Oxlade v. Northeastern R. Co.* 1 C. B. N. S. 454, 26 L. J. C. P. 129, 1 Nev. & McN. 72; *Nittsill, etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39. See 1 Inters. Com. Rep. 862.

<sup>4</sup> *Garton v. Bristol & E. R. Co. supra*; *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029; *Strick v. Swansea Canal Co.* 16 C. B. N. S. 245; *Runsome v. Eastern Counties R. Co.* 1 C. B. N. S. 437; *Nicholson v. Great Western R. Co.* 1 Nev. & McN. 121, 5 C. B. N. S. 366.

<sup>5</sup> *Handy v. Cleveland & M. R. Co.* 31 Fed. Rep. 689.

<sup>6</sup> *Heck v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 775.

## CHAPTER XIX.

### UNJUST DISCRIMINATION,—CONTINUED.

§ 125. *Carrier, as Shipper, Must not Favor Itself.*

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Where a railroad corporation is not only a carrier for all persons who may offer, and is charged with duties of impartiality as such, but it is also itself a shipper over its own lines, and where it may be said to offer to itself property for transportation, and this not merely casually and for some temporary or special purpose, but regularly and as a very large part of its business, and where indeed, it is probably true that it became a carrier because of having immense quantities of property to be carried, and that its line was constructed mainly for its own purposes as owner and shipper, the business of common carrier being added to that of producer and dealer in coal with a view to an additional profit or to lessen the cost of conducting the primary business, the situation creates a difficulty in dealing with the case. It presents the question of impartiality in such a manner that it may not be possible to deal with it as it would in general be dealt with if it were to arise as a question affecting rights as between third parties who were shippers only. It might be easy to apply the rule against unjust discrimination in that case, while it might be difficult to call it a rule against unjust discrimination in this case. The right of the complaining party might be precisely the same in each case, and yet the situation might make the method of enforcement quite different, and might even require that a different term should be applied to the wrong from which the complainant suffered. But no matter what the situation is, the carrier must not use its power and the means at its disposal as a carrier to avoid performing the full measure of its duty. It must not use them oppressively. It must, as far as possible, deal as between all shippers, including itself as a shipper, in such a way that all shall



have proportional benefit whenever demanding its service. Otherwise the courts will find a method of reaching the wrong it inflicts upon the public.<sup>1</sup>

The present condition of transportation, as affected by the price of one important article of large consumption, and the combinations among carriers, who are themselves producers of the article, to reduce production and thereby enhance the market value, and relatively increase the charges for transportation, has drawn from the chief executive officer of one of the most important railroad companies in the country, an expression of his views on the subject, which, by virtue of his experience, commend them to careful consideration. He has been impressed with the fact, that sooner or later the disparity between bituminous and anthracite rates would cause trouble to the anthracite carriers, who are also carriers of bituminous coal, and that sooner or later an equalization of the rates on both classes of coal would be forced upon them. The rates received for carrying bituminous coal are not over two thirds of the rates per ton per mile anthracite coal is paying, yet bituminous coal rates are considered fairly remunerative. The conclusion reached by the Interstate Commerce Commission in the case of *Coke v. Lehigh Valley R. Co.* (3 Inters. Com. Rep. 460) also seemed to indicate that the two rates must be brought closer together.

Regarding the proposed advance in the price of anthracite coal involving, naturally, an increase in the rates for carrying it, he states that "it has always been the policy of our company as far as possible to manage its traffic in harmony with its competitors, and our recent action simply made our rates conform as nearly as possible to those which were then being charged by other lines. It was made necessary by the new system established by our competitors of making the rate bear a certain relative proportion to the selling price of the coal and resulted in a reduction of the nominal rates which have been prevailing, and it seemed to me to tend toward a proportionate reduction in the cost of the coal to the consumer. But if this is to be followed by an advance in

<sup>1</sup> *Haddock v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302.

the price of coal, forced by a curtailment of the production, I fear it would be impracticable for our company to continue the policy it has always heretofore deemed wise to adopt, as we have never at any time been in harmony with the policy of restricting production for the purpose of advancing the price of a commodity, and the interests of our company are those of a transporter whose object it is to stimulate the production of articles rather than restrict them."

Speaking of the policy of restricting the production and advancing the price to the consumer for the purpose of getting a better price for the coal at the pit's mouth and higher rates for the transportation, he expresses the view that it is not to the interest of the public, or of any railway company engaged in its legitimate business as a transporter, to become owners of coal property so as to bring them, as both transporters and producers, into antagonism with the interests of the community. "At the present time the manufacturing interests of the country as well as the mining industries are in a very depressed condition, and it seems to be a necessity in the bituminous traffic as well as in the iron industries for the transporter to make concessions in a variety of ways in the endeavor to keep these industries in a productive condition. The policy now proposed, as I understand it, the handling of the anthracite product is to be the reverse of this and would mean an endeavor to secure higher prices for the anthracite coal which is so necessary to many of our industrial interests, and also higher prices for the transportation thereof by curtailing the product. This certainly seems to be a very unwise policy to pursue."

Indeed, he is very clear in his conclusion, that it is neither to the interest of the public or the shareholders in a railroad company to become a party to a combination which proposes to restrict the production of an article which is as necessary as anthracite coal to the commercial prosperity of the country. Any such policy must inevitably result in arraying the public and the constituted authorities intrusted with the enforcement of the laws against the companies which pursue such a policy and end in disaster to all corporate interests. In the case above referred to

*Coxe v. Lehigh Valley R. Co.*, 3 Inters. Com. Rep. 460, the questions presented for determination are the alleged undue preferences, unjust discriminations and unreasonable rates pertinent to which the complainants submit for the consideration of the commission proposed findings of fact in substance as follows: 1. That the Lehigh Valley Railroad Company carries anthracite and bituminous coals over the same distance in the same direction under different classifications, that the tariff sheets and rates applicable to anthracite do not apply to bituminous and that the two coals are a like kind of freight and should be classed together as one class of freight. 2. That the acts done by the Lehigh Valley Coal Company connected with the buying and selling of coal and the transportation of the same over the road of the Lehigh Valley Railroad Company are the same as if done by said railroad company, and as done constitute illegal and unjust discrimination against the complainants and the public generally; and that the proper rate to be paid by all shippers over said road between the same points at the same time is ascertained by deducting from the established rate the loss sustained by said coal company as a buyer of coal for shipment over said railroad. 3. That the average rates per ton per mile charged by the Lehigh Valley Railroad Company on anthracite coal are higher than on general freight, and that the rate of \$1.80 per ton of 2240 pounds to Perth Amboy from the Lehigh coal region, a distance of about 135 miles, is excessive and unreasonable, "and should be reduced to what the commission may decide to be a reasonable rate." It is conceded that the bituminous coal mines are twice or more than twice as distant as the anthracite mines from New York Harbor or Perth Amboy, while the transportation charges on bituminous were and are greater in the aggregate, but less in proportion to distance, or per ton per mile; it is shown that in the last ten years the price of anthracite in eastern markets has been maintained and the price of bituminous considerably reduced; and that many manufacturers and consumers discontinued the use of anthracite and substituted bituminous while the complainant and other producers failed to find profitable markets for anthracite they produced and were prepared to produce.

The complainants insist that the displacement of anthracite by bituminous has deprived them and other miners of hard coal of profitable markets, and that this condition is the result of excessive rates on anthracite and of inequality and discrimination in favor of bituminous; that a readjustment of rates on a basis of the relative distances of the fields of production would reinstate the anthracite in eastern markets; and that the classification of the two coals as one freight would remove the inequality and discrimination in favor of bituminous and establish all coal charges on a mileage basis, except to the extent that terminal expenses might modify the rate per ton per mile for longer distances.

For convenience in making transportation rates and charges, freight is arranged and put into different classes according to expense of carriage, bulk, value, risk, competition and other considerations affecting the cost and value of the transportation service. Different classifications have been and are still maintained in various sections of the country, and it frequently occurs that articles classed together in one section of the country are placed in separate classes in another section. The number of separate classifications has been so reduced and such as are still in force so revised in the past few years as to give assurance that one uniform classification applicable to all the roads of the country is entirely practicable. By the arrangement of the various articles or subjects of freight into classes many hundreds of such articles are given one and the same rate. Without such arrangement railroad companies would necessarily be required to fix a rate on each one of the several thousands of articles carried by them.

What was known as the "Official Classification" is in force in a large part of Illinois and in all the district of country east of that state and north of the Ohio and Potomac rivers, including the anthracite coal fields. Under this classification, freight, with few excepted articles, is collected, arranged and numbered into six classes and given as many separate rates. The freight not included in any of the six classes is mostly coal and other minerals, and articles of great weight as compared with their value. These are classed or rated by name as a commodity. Anthracite and bituminous coals are so named and rated respectively as such, or

as hard and soft coal, and as a rule a higher rate is charged on the hard or anthracite. Again, the anthracite is arranged, classed and rated in more minute divisions, according to sizes, uses and the different value resulting from such sizes and uses. One complaint the commission is to consider and which it is asked to remedy is this separate classification or rating of hard and soft or anthracite and bituminous coals. It is asked to find that the two are the same freight, a like kind of traffic, the result of which would be to subject them to the same charge, when carried under like circumstances.

In the present state of the law classification or the arrangement of articles together for convenience in rating them is not obligatory on the roads. They might legally fix a rate on every article of freight by name without other arrangement or classification. Such a system has proven to be so cumbersome and inconvenient that the arrangement of freight into classes is deemed by the roads an essential part of rate making and it is so treated by the Act to Regulate Commerce, which requires that the schedule of charges which every common carrier must keep open to the public "shall contain the classification in force."

Under the Official Classification the charge per hundred pounds between New York and Chicago was :

Class	1	2	3	4	5	6
Cents	75	65	50	45	30	25

The charges on grain, salt or other freight in the sixth class was 25 cents. The rate may be doubled by changing the classification from the sixth class to the third; and classification may be used as a device to effect unjust discrimination or as a means of violating the most essential provisions of the statute. When so used it is the duty of the commission to so revise such arrangement as to correct the abuse.

The grounds upon which it was asked to find these two coals to be the same freight, a like kind of traffic, was that they are loaded, unloaded and transported in the same way and substantially at the same expense to the carrier, and are largely used for the same purposes, though one half or more of the anthracite is

used for domestic purposes. Ordinarily there is no better criterion for reasonable charges than that which is in proportion to the service rendered; and if the cost and expense of the carrier was the only test of a reasonable charge the claim might well be made that all coals should be classed together as one freight and be subject to the same transportation charges.

Carriers in making separate classifications, or rates for different coals, take into consideration, not only the expense of transportation, but the value of the freight and worth of the transportation to the shipper; the exceptional qualities which fit the more valuable anthracite for domestic and special uses and cause its large consumption in less distant markets; the shorter distance from the mines to the principal markets rendering the transportation proportionally more expensive, and the necessity for so apportioning the transportation charges between the anthracite of different sizes and values that the more valuable may bear the greater charge.

Transportation is sought by the shipper for the profit it yields and will cease when it becomes unprofitable. In the ordinary course of business, income or profits are proportioned to the investment and a carload of ten tons of anthracite coal worth fifty dollars affords larger profits and can better bear full transportation charges than a like quantity or carload of bituminous worth twenty dollars, and the value of the freight with the worth of the transportation service to the shipper are taken into account in determining classification.

The rule insisted upon, and claimed to be especially applicable to coal, that the cost of the service alone should determine freight classification and freight charges, will apply as well to different sizes and values of anthracite as to bituminous and anthracite. Under such a rule the different sizes of anthracite now carried at different rates would be one freight and take the same rate, while a difference is now made of 30 to 50 cents per ton between the larger and smaller sizes. Let it be assumed that \$1.70, the average anthracite rates to Perth Amboy complained of, was 30 cents too high, and that \$1.40 was the reasonable rate for all anthracite. This is now the rate on pea, the best of the lower

grades of anthracite, while on buckwheat and culm it is but \$1.20. Classification of anthracite in disregard of sizes and values would add 20 cents per ton to the charges on some and reduce them on none of these lower grades of coal. The undue preference complained of is chiefly the alleged exclusion of these certain grades of anthracite from market by discrimination in rates. The result of classifying and rating all coal, including these lower grades or smaller sizes, as one freight would be that the smaller anthracite coals at the increased rate would be at still greater disadvantage than they now are, and for ordinary steaming would be cut out by bituminous, while for the uses in which anthracite is indispensable the larger sizes at the same rate would displace the smaller. The consequence would be that 25 per cent in quantity, or about 16 per cent in present value, of all anthracite mined would be unable to bear the burden of transportation and would be waste until such time as it could be locally converted into power and the power transmitted. There is therefore, the commission concluded, for the present, no hardship, but economy, in making the best bear some of the burden of the inferior, which is not a voluntary but a resulting production. To determine otherwise and make waste of lower grades is to impose on the higher grades the entire cost of producing both. The result would be to largely increase the cost of production and the price of merchantable anthracite, and make waste of about one fourth of all that is mined.

Insisting that they were deprived of markets by charges which are both excessive and disproportionate, the complainants asked that the rates may be adjusted in proportion to distance, making due allowance for difference in the cost of collecting, loading, unloading and other terminal expenses. If complainants were deprived of markets by excessive and disproportionate charges, and the adjustment of coal rates in proportion to distance would remedy the evil, still it is said this could not be accomplished by classifying hard and soft coal together. Such classification would have some bearing on the general question of relative rates on the two coals carried between the same places, or between different places under similar circumstances, but could not much affect the rates in question on anthracite

carried 125 to 185 miles and bituminous carried all rail three hundred to five hundred miles, nearly, and at aggregate rates 55 cents to \$1.05 per ton greater than the aggregate on anthracite.

The defendant company claims for terminal expenses, in taking up coal at the Lehigh and Mahanoy region, and delivering it at Perth Amboy, an average distance of one hundred and forty-nine miles, 50 cents, or one third of a cent per ton per mile. The same terminal expenses on bituminous carried from the Snow Shoe to Perth Amboy 300 miles would be but one sixth of a cent per ton per mile. But there are considerations apart from terminal expenses which make transportation for long distances proportionally less expensive and more advantageous to the roads than for short distances. Many items of expense and much of the cost of operating a road are the same whether the business of the road is large or small, and therefore as the volume of business increases the expense apportioned to it is less, and as the distance is extended the volume is increased. The best managed roads do not always have full trains and full cars, and are subject to expensive delays and loss of time while securing freight. The opportunity for back loading increases with the distance, while delays and losses are as applicable to long as to short distance freight, and, as in case of terminal expenses or other aggregate charges, the cost of such delays and losses are less per mile when apportioned to longer carriage and to increased volume of business.

There are several lines other than that of which the defendant's line is part over which coal is carried from the Snow Shoe district to New York harbor, and these lines are of different lengths. On the basis of equal mileage there could be no competition between the roads. The shortest having the least mileage and lowest rate would get the business.<sup>1</sup>

The undue preference of which complaint was made of the Lehigh Valley Road in respect to the bituminous coal traffic is that it participated in the carriage of coal as part of a through line, and receives for the distance over its line, less in the aggregate

<sup>1</sup> *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.



and proportionally than it charges on anthracite carried over its same line the same distance in the same direction.

What it accepts on freight received from another road may indicate the rate at which coal may be profitably transported over its road the same distance in the same direction. But the law favors through carriage and treats the carriage by arrangement over connecting lines the same as if done by a separate line. The carriage in question was one through carriage from the Snow Shoe to Perth Amboy at through rates and for reasons already stated the defendant road gave no undue preference to the bituminous traffic by participating in carrying it lower proportionally for the longer distance, except as its charges on anthracite may be excessive.

Having shown that bituminous coal is and for ten or more years last past has been gradually supplanting and taking the place of anthracite in Atlantic coast markets, that the price of anthracite has been maintained and the price of bituminous has declined one third, the complainants assume that this substitution of bituminous for anthracite in other than domestic uses is "due to the difference in freight rates."

It will hardly be questioned that the substitution of bituminous for anthracite is dictated by reasons of economy effected through the reduction in the price of soft coal. But it is not proven nor does it otherwise appear that this reduction in the price has been effected by or is the result of a like and contemporaneous reduction of freight rates, or that any change has occurred in the relative transportation charges on the two roads.

The traffic and business of the defendant road is mainly anthracite coal. Its main line does not reach bituminous mines, but is laid from tidewater to the anthracite regions, its several branches extending to the different anthracite mines. It is a carrier of bituminous coal incidentally and in connection with other roads with lines extending from the bituminous to the anthracite region. The quantity of bituminous carried by it is so insignificant in comparison with its anthracite business that the commission declined to suppose it establishes or maintains rates on the two coals for the purpose of depriving its customers of their markets

for anthracite, which is its chief business and support. Nor would it presume that by carrying in connection with other lines a few thousand tons of coal which would find its way to the same markets at the same rates over other lines, some of which reach tidewater in the same state where the coal is produced, the defendant intended to or did deprive complainant of a market for their coal of any sizes.

Eleven tons of anthracite no more than equal ten of bituminous in heating and steam producing power and there is economy in the use of the soft coal for all purposes to which it is suited. In the last ten years new bituminous mines have been opened and old ones largely extended in the territory from which Atlantic coast markets are supplied. The discovery and use of gas as fuel has to some extent superseded bituminous in markets further west and increased competitors for the markets to the east. Multiplying and increasing competitors and sources of supply compel acceptance of lower profits. Nothing connected with bituminous coal mining has made it more expensive than it was formerly, while new inventions and improved appliances have all been favorable to lower cost of bituminous coal producing. These and possibly other causes have contributed to the reduction of the price of bituminous coal in eastern seaboard markets.

While the tendency of railway transportation is towards lower charges, it has not been very considerable anywhere east of the Alleghanies in the past few years. Except in the increase of business the change in the conditions on which railway charges are based have not been so marked since 1880 as to justify the assumption of any considerable reduction in rates which were then reasonable. Still conceding that the use of anthracite for steam and manufacturing purposes has given place to bituminous in consequence of the difference in price, and assuming that the decline in price is in some part the result of reduced rates on bituminous coal, this would not justify any change in the classification or system of rating which would have the effect of raising the rates and increasing the price of bituminous coal to consumers. The lower rates on grain from more distant fields have compelled the acceptance of reduced prices by the grain growers

nearer the seaboard. They could retain their markets at a better price if the roads would maintain the rates proportioned to distance, but this would turn fields of the west into waste lands and deprive the east of some part of its daily bread. On grain, roads accept higher aggregate rates, but, measured by distance or may be by the service rendered, more moderate profits, and the wants of one distant part of the country are thus supplied from the abundance of another. The commission find nothing of injustice or that is unlawful in this rule nor any reason why it should not apply as well to the product of the mine as to the product of the field.

The rate from the sources of supply to Perth Amboy being \$2.25 per ton on bituminous, the aggregate difference in the rates on the two coals from the respective places of production to Perth Amboy is 65 cents, taking the average on all sizes of anthracite, the aggregate on bituminous being higher by \$1.05 on buckwheat, 85 cents on pea, and 55 cents on large sizes. The complaint is that this difference is too small; that compared with the charges on bituminous the anthracite charges are too high,—and what the complainants seek in this branch of their case is to obtain such an adjustment of the charges on the two coals as will leave these aggregate differences greater than they are.

Supposing it to be legally determined that the defendant and other carriers of the two descriptions of coals should carry them at the equal rates for the same distances, or per ton per mile, this would hardly accomplish the purpose aimed at by the complainants. Some of these all-rail carriers of bituminous to eastern markets are not carriers of anthracite and their charges on bituminous could be made without regard to the charges on anthracite to the same markets. Then, again, these markets get some coal through the port of Philadelphia, and are supplied with bituminous through the ports of Maryland and Virginia in sufficient quantities to determine the rates on bituminous to Atlantic coast markets independent of the transportation charges on anthracite over other routes.

The difference in the aggregate cost of transportation to Perth Amboy and through that port to eastern markets as between the

competing coals might be increased through higher charges on bituminous as readily as by means of lower charges on anthracite. The complainants ask relief through lower charges on anthracite, at the same time insisting that the charge on the two coals shall be in proportion to the distance of carriage.

The effect of such a rule, as already shown, is to require increased bituminous rates or to make them higher than they would otherwise be over the longer distances, and thus shut the cheaper coal out of New England and Atlantic coast markets. The effect of any regulation resulting in the increase of rates on bituminous is to close the markets further east against it and give them to the more expensive anthracite, confined to the limited territory of eastern Pennsylvania, already monopolized. An impost duty has been laid on foreign coal, in part at least to the end that these markets might be supplied from the abundance of Pennsylvania, Maryland and the Virginias, and any regulation imposing additional transportation or other burdens on bituminous coal to keep it out of eastern markets would seem to challenge the wisdom which deposited an abundance of cheap fuel in the east side of the Alleghany mountains.

The ruling price of the steaming or smaller sizes of anthracite is \$1 per ton less than the price of bituminous at Perth Amboy and in the markets from which complainants aver they have been excluded. The charges over the Lehigh road in connection with the Pennsylvania road from the Snow Shoe region to Perth Amboy are as high either in the aggregate per ton per mile as are paid on any bituminous coal mined east of the mountains and carried by rail to New York harbor. They are duly authorized and established, and the said Lehigh Valley Railroad Company by the charges aforesaid is giving no undue preference to the bituminous coal traffic. Nor is the anthracite coal traffic subjected to unreasonable disadvantage in respect to the transportation charges on bituminous from the Snow Shoe region or elsewhere by the Lehigh road, except as its charges on anthracite may be excessive and unreasonable.

In addition to the alleged undue preference in favor of the bituminous coal traffic to the disadvantage of the traffic in an-

thracite, the complainants aver that the defendant railroad company is giving undue preference to the Lehigh Valley Coal Company, by charging complainants more for the transportation of anthracite coal than is charged to said company.

In support of this averment of illegal preference in favor of the Lehigh Valley Coal Company, it is shown that the railroad company owns the capital stock, property and franchises of the coal company. The same persons are officers of both companies. The railroad company advances and furnishes to the coal company, without interest, large sums of money necessary to the transaction of its business as a miner, purchaser, shipper and seller of coal. The coal so mined or purchased by said coal company is shipped over said railroad. The complainants and the said coal company send their coal to, and sell it in, the same markets. Some of the transactions of the said coal company as a buyer, shipper and seller of coal are profitable, others unprofitable.

Both the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company are corporations of the state of Pennsylvania, the constitution of which state, adopted after the incorporation of these companies, contains the following provision relating to common carriers engaging directly or indirectly in mining or manufacturing articles for transportation over their roads: "No incorporated company doing the business of a common carrier shall directly or indirectly prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, free land or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length." A provision in said constitution in relation to officers and agents of roads being interested as carriers over the roads of the companies represented by such officers and agents is as follows: "No president, director, officer, agent or employe of any railroad or canal company shall be interested directly or indirectly in the furnishing of ma-

terial or supplies to such company, or in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by such company."

The tendency of all such interested management as is indicated by the above constitutional provisions is towards the destruction of legitimate competition, whether the interest is in the carrier or in its officers and those who direct and control it. If railroad companies and those who direct and control their roads were limited to the business of transportation it would take away from both the opportunity to unlawfully prefer themselves as shippers. Disinterested and impartial control is essential to prevent illegal favoritism, and abuse of the privileges with which carriers are invested for the benefit of the public.

The railroad companies, including the defendant, produce or control, directly or indirectly, three fourths of the coal carried by them; by agreement they fix the rate of transportation, and by nominal association with the individual operators, who represent less than one fourth of the anthracite output, fix the selling price in the principal market. In the eight years beginning 1880 the prices and rates of transportation of coal delivered free on board in New York harbor have varied nearly in the same proportion. In 1885 and 1886 the price was about \$3.40 and the rate \$1.40; in 1880 and 1888 the price was about \$3.90 and the rate \$1.90 and \$1.80. For the most part the increased price to the consumer has gone in payment of the increased rate to the carrier, leaving to the operator about the same earnings whether the price of coal is high or low.

Where the carrier is both carrier and producer or operator, as is true of some of the railroad companies, which in their own corporate name are miners, buyers and sellers as well as carriers of anthracite, it matters little so far as relates to its gains and profits how much such a carrier charges itself for carrying its own coal. Nor is it essential to the pecuniary interest of the Lehigh Valley Railroad Company whether it charges its coal company as a miner and shipper very high or very low transportation rates, entitled as the railroad company is to the earnings of both. The case is different with the complainants, who have only so much of the

market price as remains after paying for transportation, and suffer the loss of any excessive charges. Besides being competitors, as they are, for the same markets, any excessive charges made or burdens imposed on complainants, and not made and imposed on said coal company, give it unlawful preference and subject complainants to the unreasonable disadvantage of paying more to reach a common market from the same places of production.

It can hardly be questioned that the methods of business might be such, transactions might be so conducted and charges made excessive or otherwise, as between said railroad and said coal company, which would be immaterial to the actual revenues and income of the railroad company, but which would unjustly discriminate against complainants and other shippers.

Whatever opportunity for oppression and abuse may be afforded, or whatever possible injury might result to the public interest, from the corporate ownership and control, or corporate relations existing between the Lehigh Valley Railroad Company and Lehigh Valley Coal Company, the authority of the Interstate Commerce Commission extends to such abuses only as are in conflict with the Act to Regulate Commerce, or some of its provisions. The history of mining operations, and their relations to transportation, in the anthracite regions, as disclosed in the testimony, shows that the carriers, directly in their own corporate names, or indirectly through other corporations, in which the carriers owned the capital stock, became coal miners and dealers as a means of securing the freight. Said Lehigh Valley Coal Company was able to control for the railroad company the transportation of the coal mined from the lands of the coal company and lands leased to it whether such coal was mined by itself or others, as well as large quantities of coal it purchased. That such was the legitimate purpose for which the railroad company organized the coal company was confirmed by the exceptional readiness of the railroad company to disclose the business transactions and methods of the coal company as a miner, dealer and shipper. But the legality of the acts of the railroad company is not determined by its purpose, but depends upon their effect. However well intended the transactions may be, as between said railroad

and said coal company, they are unlawful if they effect undue preference or unjust discrimination.

The railroad company insisted that the coal company, in pursuance of its chartered rights, may mine, buy, sell and ship coal over said road, as complainants and others engaged in the coal business may lawfully do, and upon the same equal terms and advantages, and none other. The railroad company advances to the coal company nearly seven millions of dollars with which to transact its business, and for the use of which the railroad company receives no advantage other than such advantages as it gets from carrying the freight of the coal company. The value of the annual use of such advances at five per cent interest amounts to three hundred and fifty thousand dollars, nearly. This sum exceeds ten cents per ton on all the coal shipped by the coal company over the lines of the railroad company, and is to that extent an undue preference given to said coal company, to the disadvantage of Coxe Brothers & Co. and other shippers who receive no advances. The advantage of like advances if made to complainants, estimated on their annual shipments, would exceed one hundred thousand dollars. Had the Lehigh Valley road as a means of securing freight made like advances to any other competitor of complainants, whether an individual operator, or a coal company in which the railroad company had no interest, it would hardly be contended that such act did not amount to undue preference and unjust discrimination. The fact that the road was interested in the coal company, as the owner of its capital stock, does not make lawful what would be unlawful without such interest.

The railroad company states its outlay, including funded debt, capital stock and other liabilities, at about \$73,000,000, on which it claims the right to earn a reasonable income. Conceding that the amount lawfully and properly invested, fixed charges and operating expenses, are important elements in determining the reasonableness of rates, the large sums advanced to its coal company by the railroad company, applied to the reduction of its bonded debt, would so reduce the obligations of the road that lower rates would provide for them. The cost of producing and delivering coal at New York harbor includes the cost of production and



transportation. The cost to the dealer and shipper is the price paid for the coal, and its transportation. Either miner or dealer, who sells his coal for less than will pay the cost of the coal, after deducting transportation charges, loses in the transaction. Should a railroad company, to secure freight, or for any other purpose, purchase coal at the anthracite mines, carry it to market and sell it at such a price that, after deducting the price paid and expense of selling, would leave the road, as a purchaser, less than would pay its transportation charges, the result or effect of the transaction would be that the road had given itself a lower rate as a dealer than it gave to other dealers and shippers. The road would be thus giving itself undue preference, and the legal effect must be the same whether this is done directly by the road in its own name, or indirectly in the name of another corporation, of which this railroad company is proprietor. The transactions are frequent in which the coal company, as buyer, shipper and seller of coal, incurs losses after paying to the railroad company the published rate. Every such transaction being in effect the same as if done directly by the road in its own name, is an undue preference to the disadvantage of its customers who sell in the same markets in competition with the coal company. One such transaction was the contract with the Manhattan Railroad Company, which was to continue for two years, and might be and was renewed. By this contract, the coal company was to and did deliver to the Manhattan Company at stated periods, in the years 1887 and 1888, large quantities of coal, upon such terms and at such prices that, after deducting the price paid and expense of marketing the coal, there was left to the coal company a less sum than would pay the published legal rates of transportation.

If the commission consider this Manhattan sale and delivery as done by the railroad company, then it lost a part of its freight as a rebate to the coal company. Considered as done by the coal company, then the railroad company was a loser to the same extent as the sole stockholder of the coal company. Viewed either way, the railroad company realized less than the full transportation rates paid by the complainants. The dealer, whether the coal or railroad company, that reached the market at the lower

rates would have the advantage, and could take the market from, and drive out those who were unjustly discriminated against, and made to pay excessive or higher charges.

When it is made to appear on investigation that any common carrier is unjustly discriminating against any person, company or firm, subjecting them to unreasonable disadvantage, or doing anything in violation of the Act to Regulate Commerce, the remedy which the Act provides is that such carrier be required to cease and desist from such violations. Is this remedy practicable in the case under consideration?

The legal right of the Lehigh Valley Railroad Company to take and hold the capital stock of the Lehigh Valley Coal Company, and the right of said coal company to mine, buy, ship and sell coal, it is said, is not raised in this proceeding, and if such right were raised and challenged the Interstate Commerce Commission has no authority to determine it. While the coal company may, in the exercise of its chartered rights, buy and sell coal, certainly the commission cannot determine the prices at which it may buy and sell, so that the railroad company may realize its established freight rates as carrier and suffer no loss as stockholder. The Interstate Commerce Commission would be incapable of any such determination if it had any authority to make it. With the market fluctuations in coal as well as other products which may rise and fall from day to day, it is not practicable to determine in advance at what price the coal company must buy that it may sell at such profits as to pay full freight charges.

And while the coal company in the exercise of its chartered rights may acquire and hold mineral and other lands, at its own pleasure, mine or buy coal without restraint as to cost, and sell it at whatever price it may be willing to accept, and is able to obtain, it is impracticable, the commission conclude, to regulate or cause the discontinuance of the conditions and methods of business, which result in the undue preference and discriminations complained of in this branch of the case. The commission state that one allegation of the complainant is that the coal company so conducted its operations as a miner and shipper that its net income from a large mining business was not sufficient to pay freight

charges, and that as a result the railroad company, through the operations of the coal company as miner, shipper and seller, as well as through its transactions as dealer, was giving to the coal company undue preference. The cost of mining anthracite coal so varies with different conditions and is so difficult of ascertainment under any conditions, that it is even more difficult to fix and so adjust the operations of the coal company as miner, shipper and seller than it is as buyer, shipper and seller without subjecting individual shippers to disadvantage, and this allegation of the complainant was not insisted upon in the argument.

The relief asked by the complainant for the injustice alleged to result from the relations of the railroad company to the coal company, and its method of business as buyer, seller and shipper of coal, is not that defendants shall cease and desist from mining, buying, shipping and selling coal, but that complainants, together with others similarly situated, shall have the benefit of a rate ascertained by deducting from the established rate the loss incurred by said coal company in its transactions as a buyer and seller of coal shipped to market over the Lehigh Valley Road. From the evidence the commission find that from the time of the enactment of the Act to Regulate Commerce, the business of the Lehigh Valley Coal Company as a buyer, shipper and seller of anthracite coal has been profitable as a whole, though said company has in that time, on various and frequent occasions, suffered losses. Its business is not limited to interstate traffic, but extends to other traffic as well. No separate account is kept, and the business is not so conducted as to render any reliable estimate of the loss on interstate business practicable. In every month some transactions are profitable; others are not. In many months the losses exceed profits, and the amount of loss is different in different months. At times it is different from day to day. Conditions so variable can form no basis for determining rates which must be reasonable, and afford no standard by which to measure the extent to which charges may be excessive. Yet the fact that the railroad company, directly as a carrier and indirectly through its coal company as an operator, so conducts the business of buying, shipping, carrying and selling coal that the road realizes less for transportation

than its established rates, affords evidence of the defendant's readiness to take the freight at less than full charges, and justifies the conclusion that the charges to others are to some extent excessive.

In the progress of the investigation, the complaint as to the rate from the anthracite regions west to Buffalo was abandoned, and the reasonableness of the charges from complainant's mines east to Perth Amboy is yet in dispute. These charges as complained of were \$1.80, \$1.40 and \$1.20, according to sizes, averaging on all \$1.70 per ton. As reduced, pending the investigation, they are \$1.70, \$1.40 and \$1.20, and the average is \$1.60. It is the question of the alleged unreasonableness of these lower rates that the commission are to determine.

In the closing argument on behalf of the road, counsel said the railroad companies, without the interference of the commission, "will make a reduction in their rates of freight. Such a reduction will show a rate per ton per mile which will compare favorably with the lowest charged according to the tables the petitioners have produced." Since this assurance was given, the railroad companies, including the defendant, have made an average reduction of ten cents per ton. The tables produced in evidence by the petitioners show that, as reduced, the rates are yet twenty-five cents per ton on the larger sizes, and twenty cents per ton in the average on all sizes, higher than the rates which were in force for the two years and more next before the Act to Regulate Commerce took effect, and that at various times previous to 1881 the rates were lower than the average for the two years next before the Act was in force.

In the last ten years, the market price of coal has not increased. The cost of production has been maintained or increased, and the cost of railroad service from the anthracite region to New York harbor has declined, as the result of the increased volume of business. The aggregate charges of the defendant company on other heavy and low grade freight, including iron ore, pig and other iron, of greater value, carried the same distances, and its proportionate charges for such heavy and low grade freight, for shorter distances, are less than its charges on coal. The Lehigh

company estimates and reports its expense, or cost of service, to be eighty-eight cents for every dollar earned, in carrying all other freight, and fifty-six cents expense per dollar earned in carrying coal. Under the rules of classification generally prevailing miscellaneous or general merchandise is rated considerably higher than coal,—while the charges of the defendant are considerably more on coal, the least expensive freight, than on its more costly general freight. These facts lead the Interstate Commerce Commission to the conclusion that the rates in question are unreasonable.

After submitting the proposed findings of fact for the consideration of the commission, counsel for complainants in his concluding argument said: "As to the unreasonableness of the charge, we ask the commission to find that the rate of \$1.80 is unreasonable within the statute. We do not ask or care about your Honors' establishing any particular rate." . . . "There are a great many ways in which these coal rates can be determined without fixing any arbitrary or inflexible standard. It could be by a sliding scale depending upon the price of coal. You could determine first the cost of mining coal and then the cost of railroad transportation. . . . Another way to establish the rate would be at some fixed proportion of the average of the selling price of coal at tidewater. . . . If they (the carriers) are informed that their present rate is unreasonable they will then meet the individual operators of their districts in consultation and I am sure some amicable arrangement will be reached by which both parties can make money."

Complainants' counsel here expressed the belief that the coal traffic afforded a fair profit to both producer and carrier; that to secure an equitable division of the profits it was only necessary to declare the charge made to be unreasonable and the parties would come together and fix the proper rate themselves.

Counsel for the road said in reply: "That will not do. If this commission says that the present rates are unreasonable they must say so because there is a different rate they have determined to be a proper one. It will not do for you to make a general finding and to say: 'The present rates are unreasonable, but we

do not know what they ought to be. 'We cannot fix them for you. You must agree upon them amongst yourselves.' If unreasonable, say to what extent they are unreasonable; whether to the extent of a cent, or of many cents, or of a dollar, a ton. Would it be proper for you to lay down an abstract principle that would lead to endless confusion in the application? That would put all at chaos. For Heaven's sake do not ever make the matter of the proper rates for carrying coal one to be regulated in a conference between the carrier and the shipper. If you have been convinced by these petitioners that the present rates are unreasonable and unjust, then say what the rates ought to be. This will be your duty. I do not wonder that Mr. Gowen shrinks from asking you, with the imperfect materials he has presented, and with the information he has failed to furnish, to say what these rates shall be."

To this appeal to Heaven and the commission the latter answered that having declared the rates in question to be unreasonable, if it should act upon the suggestion of counsel for complainants and fix upon none which may be properly charged, the case before the commission would be at an end when the railroad company was notified that its rates were found to be excessive and must be modified. The commission having prescribed no measure of reduction, any modification made in good faith would be a compliance with the required modification, yet it might be unsatisfactory to complainants and other operators and fall short of what the law requires. Then the occasion would be presented when the operators and carriers might meet and amicably arrange what the charges should be in accordance with the suggestion of complainants' counsel.

In such a meeting or conference of operators and carriers, where possible conflict of interest and opinion could arise, it might and most likely would occur that no satisfactory arrangement would be reached, and another application to the commission would be necessary to declare the reduced rates still unreasonable. This process would need to be repeated until the legal rate was established by successive reductions, made in compliance with a series of determinations of the commission that the rates were unreasonable.

In the case under consideration suppose the facts to be as claimed, that the charges are excessive, as much or more than 50 cents. Under the rule suggested by complainants' counsel, when the rate was ascertained to be unreasonable it would be so declared and left with the shipper and carrier for amicable arrangement. If for any reason no scale of charges was agreed upon the rate would remain for determination by the carrier whose rate is challenged. Under such a rule applied to the subject of this complaint five several proceedings would be necessary to establish the reasonable rate if in each proceeding the carrier deemed a 10-cent reduction sufficient. If, impressed with the belief that the existing rates were not exorbitant, the carrier should attempt compliance with the commission's conclusion that they were excessive by making the least possible reductions, repeated and continual applications would be necessary to correct a single abuse. Certainly Congress intended no such absurdity as this, but, as insisted upon by counsel for the road, when the commission have been convinced that rates are unjust it will be its duty to say what they ought to be, or at least to determine upon some rate, any charge in excess of which would be unreasonable. If the duty of the commission in respect to unjust and unlawful rates ends when it has been convinced that rates are unreasonable, and so decided them to be, and for any reason the commission may not determine what are, as well as what are not, reasonable, the regulation provided by the statute, in the expressive language of Commissioner Morrison, begins with complaint and ends in confusion.

The Act to Regulate Commerce, which declares every unjust and unreasonable charge to be unlawful, and requires its provision to be enforced by the commission, confers the power to determine, and imposes on the commission the duty of determining, what are the reasonable rates which the charges may not exceed, as well as what are unreasonable.

There is no unbending rule by which to determine what common carriers may reasonably charge for their services, and the reasonable rate must be ascertained from the facts of the particular case. To be reasonable, rates must be just, both to the par-

ties immediately interested and to the public. Conceding this statement correctly indicates the object of railroad traffic to be the profits derived from it, the lowest compensation of the road cannot be less than will enable it to render the service; otherwise the freight will not and cannot be carried. The highest must not be more than the shipper can afford to pay; otherwise the freight will not be shipped. Reasonable rates are within these minimum and maximum limits, and must be determined upon the circumstances in each particular case.

It has been insisted that they may be rightly determined upon a sliding scale depending upon the price of coal, or established at some fixed proportion of the average of the selling price of coal at tidewater—the cost of mining coal having first been determined and then the cost of railroad transportation.

The roads have the same anthracite rates eastward and own or control much of the larger part of the coal they carry. The operators or their sales agents establish the same circular prices and the roads having the majority interests represented by such operators or agents could establish the rates by determining the price on which they were to be apportioned.

The suggestion often made that the cost of mining and of transportation be separately ascertained, is based on the assumption that the coal business is profitable, and is evidently made with a view to an equitable division of the profits of the coal traffic between the producer and carrier. It would seem that the carrier road can offer no reasonable objection to such a division, provided the share of profit apportioned to it added to the expense of transportation affords a fair compensation for the service rendered. The average price of coal delivered at New York harbor for the years 1880 to 1888 inclusive was about \$3.86 per ton. The cost of mining including depreciation and royalty was and is about \$1.85. The cost of transporting coal ascertained from the report of the defendant company for the year 1887 was about eighty-five cents; the cost of selling twelve cents. Deducting these several items of cost amounting to \$2.82 from the price, \$3.86, and a profit is shown of \$1.04 on the ton to be apportioned between the miner or operator and the carrier.



One half of this profit added to the cost of carriage would fix the aggregate earnings at more than half as much more, or about sixty per cent above the amount required to pay operating expenses for coal carriage, and would establish the transportation rate at \$1.37 per ton, leaving to the miner a profit of fifty-two cents on the basis of the average prices since 1880. This profit of the miner is dependent upon, and will fall off with the market price of the coal, which will decline with the reduction in rates, a fact established by the testimony of the president of the Lehigh Valley Railroad Company and the president and general manager of the Lehigh Valley Coal Company, and confirmed by the result of previous changes in transportation rates. Such a division of profits or proceeds, after deducting cost of mining, selling and transportation, would be mainly arbitrary, and the rate thus established would exceed the cost of transportation much more than the average of such excess of transportation cost over all other roads on all classes of business. But the rate, on whatever basis determined, must be fairly remunerative to be lawful, and any division of the profits or net proceeds of coal after deducting costs including transportation, as a means of ascertaining reasonable rates, needs the justification of supporting facts.

The net earnings of all the roads are from 30 to 35 per cent of the gross earnings, that is to say, of all the earnings of all the roads about \$66 of every \$100 is required to pay the expenses of earning it, and the average rates on all the roads are 50 per cent higher than would be required to earn operating expenses only. Why a rate of 50 per cent in excess of the requirements of operating expenses, the average for all other roads, is not sufficiently compensatory for the Lehigh Valley is not explained in the testimony or argument.

The rate established on this basis of adding 50 per cent to 80 cents, the expense of carriage of coal, would be \$1.28, and in comparison with the rates made on this basis the rate of \$1.37 established by adding one half of the coal profit to the cost of service or operating expenses would still be above the reasonable rate. The rate of \$1.28 is estimated on the average for coal of different sizes and values, while the rate of \$1.37 is estimated on

that which pays the highest rate and sells at the best market price. If for any reason it be assumed that coal charges should be based on the expense of transportation of all the business of said road, which is 63 per cent of the earnings from such business, and not on the expense of coal transportation, which is 56 per cent of coal earnings, the rate would be about \$1.40 per ton, or 93 cents per ton expense and 47 profit on income on the investment. But the fact is not overlooked that there are too many elements of uncertainty in any estimate of the cost of service and of mining to justify their unqualified use as controlling facts in determining reasonable transportation charges.

One of the complainants, as a witness, said, in answer to questions: "I began going in the mines when I was nine years old, and ever since that time I have given my attention to it. I graduated in the University of Pennsylvania, and after that I studied mineralogy, etc. I was six months with Professor Leslie, State Geologist on the Geological Survey. I then spent between four and five years in Europe, partly in the mining school at Paris and partly in a mining school in Germany, and I visited all the principal mines of Germany, France, Belgium and England, and since my return I have been engaged in mining coal in and around Drifton, Pa. . . . since 1865." "I was two years President of that Society." (Mining Engineers). "I would like to have the right to state before the commission that in giving this, the cost of mining coal in the Lehigh regions I am undertaking the most difficult problem in the anthracite business. I mean this question of determining the cost of coal, and if you gentlemen will excuse me I would like to make a preliminary statement. . . . For the last twenty years I have been trying to find out, and I cannot honestly say to-day what it does cost. . . . I don't think you would get any two to agree." (Of a dozen experts in coal mining put to calculate the cost per ton at the breaker.)

This complainant, when testifying before a committee of Congress as to a table giving details of the cost of coal mining, said: "Now, while the above table gives an approximate idea of how these costs are divided, it is probably not true of any one mine.

I have endeavored to make out, as nearly as I could, a table giving an average for a number of mines with which I am familiar, but you must understand that in no two mines would these two items of expense agree. In some mines little pumping is required, and in others the cost of pumping is very great. In some the cost of timbering is enormous; in others it is very small. In some mines the cost of preparation is very great, owing to the impurities found in the vein; so that, although it is probable that there are some mines where the cost of producing is as low as \$1 per ton, there are others where it costs over \$2, and the increase in cost may be in any one of the items mentioned above." (In the tables, about which the witness was testifying.) A trained, educated and conscientious expert in railroad transportation, if required to give the expense or cost of carrying coal or any single article of freight over a road doing a general business, such as is done by the Lehigh Valley Railroad, would find the same difficulty as said complainant did when asked to state the expense or cost of mining a ton of coal.

That the operating expenses on all freight was 63 per cent of the gross receipts, while the operating expense or cost of carrying coal for 1887 was 56 per cent of the gross receipts from the coal traffic, leaving to the road \$44 of every \$100 earned after deducting costs of carriage, appears from the annual report of defendant railroad company to its board of directors for that year. That the cost of carrying a ton of coal from the Lehigh and Mahanoy regions was 85 cents, being 56 per cent of the average rate for that year, is derived from the same report. The annual report of said company for 1888, made since the commencement of this proceeding, and which is in evidence, does not contain these facts or the statement from which they may be derived for that year. No testimony was offered modifying the annual report of 1887, and it may fairly be assumed that, in respect to its earnings, expenses and other matters pertaining to the subject of this complaint, said report is as favorable to the railroad company as the facts will reasonably justify. The lowest anthracite rate which has prevailed in the last 15 years was in 1879, when it was for seven months as low as \$1 per ton on all sizes. For the next five

years, it was for a short time as low as \$1.40, and much of the time as high as \$1.90.

In the two and more years from February, 1885, to April 4, 1887, the day next before the Act to Regulate Commerce took effect, the highest rate which was in force on the large sizes was \$1.57 per ton, and the lowest \$1.37, which prevailed without change a year and more. The average rate for this period, exceeding two years, on the highest and most valuable sizes, was \$1.45. On the lower grades the rate was for one half of the time as low as \$1.17, but part of the time as high as \$1.37, and the average rate on all sizes and descriptions during this period of two years and more next before the Act took effect was \$1.40 per ton.

The primary and legitimate purpose for which railroads are constructed and operated by their proprietors is the profits and gains of the business. When, therefore, the commission says, a railroad company voluntarily accepts and carries freight upon terms made by itself, it furnishes evidence tending to prove that such terms are profitable. When such terms or rates of charges are of long continuance, or are recurred to and adopted as often as necessary to secure business, the evidence is more convincing that the business, at such rate of charges, is remunerative. The rate of \$1 per ton, which was maintained seven months of the year 1879, on all anthracite from the Lehigh and Mahanoy regions, had not been in force before that year, nor has it been since. The coal is carried by the road at an expense of about 85 cents per ton, as ascertained from its own report, which is nearly 6 mills (5.7) per ton per mile for 149 miles, the average or group distance from the mining regions to the Jersey coast.

The full charges for operating expenses and profits or net earnings made by the Lehigh road on ores and some iron, both ordinarily more expensive freights than coal, is 6 mills per ton per mile or less. Still, in view of the terminal costs included, the expense of transporting coal stated to be 85 cents per ton may be accepted as approximately accurate. The rate in force in 1879 is but 15 cents, or less than 18 per cent, in excess of this expense, as compared with about 50 per cent, the average difference between

the expenses and earnings for all the roads of the country. The Commission do not believe that charges yielding but 15 cents a ton, or less than 18 per cent, more than cost of moving the freight, will yield a fair return on the amount of investment in the road, or that the rate of \$1 in the average or on all sizes which prevailed in 1879 would be a reasonable rate under present conditions.

A rate established on the basis of the average relation between operating expenses, 66 per cent, and income, less operating expenses, 33 per cent, of earnings, would be 85 cents for expenses and 43 for income on capital invested, aggregating \$1.28, which is lower than any rate in force previous to or since 1879. The rate for the year 1886 averaged on all descriptions of anthracite \$1.34 per ton, and the average for a period exceeding two years immediately preceding the enactment of the Interstate Commerce Law was \$1.40. The acceptance of rates averaging for so long a time \$1.40, and even a lower rate for more than a year without change, affords strong presumption that it is fair compensation for the service rendered; and when as in this case an average scale of charges has prevailed more than two years and up to the day when the law requiring rates to be reasonable became operative, and no evidence is produced to show why such rates would not be just, the only conclusion the commission can arrive at is that they were, when in force, and still are, sufficient and reasonable.

This conclusion it is said is fully warranted by the annual balance sheets of the railroad company, which shows that in 1886, with an average rate 6 cents per ton less, said company met all its obligations, including interest on its bonded debt and "guaranteed bonds and stocks," largely exceeding the whole cost of its road and equipment, and paid \$1,331,531 dividend on its capital stock, which also largely exceeds the whole cost of the road and equipment. In 1887, when its rates averaged \$1.49 after meeting all its obligations, said company made a dividend of five per cent on its capital stock and could have increased its dividend to more than 6 per cent, but instead carried a surplus of \$410,791 to the profit and loss account. The coal tonnage of said railroad company in 1888 was more than a million of tons in excess of that of 1887.

Its business and income were larger in 1888 than in any previous year. The increasing population and growing industries on its main line and branches and in the districts it serves secure to it a constantly increasing traffic and revenue. The transportation service is thus made less and less expensive and warrants more moderate charges.

In the more than two years immediately preceding the enactment of the Interstate Commerce Law, during which time the average rate on all descriptions of anthracite was \$1.40, it was on the larger sizes \$1.44½, and on all the smaller sizes \$1.24½. In 1888 the lower grades were divided and rated under two descriptions, thus making three different classes of anthracite, the prepared and sizes larger, the pea, and the buckwheat and culm. When the arrangement was in two classes the difference in charges on pea and lower grades was at times 15 cents, but usually 20 cents, less than on the grades above pea. After the division into three grades or classes the charges were for a time on the higher grades as much as 40 cents above pea, the best of the smaller sizes. As arranged by the reduction made subsequent to the hearing in the case the charges on pea are 30 cents less than on the more valuable, and 20 cents more than on the sizes less valuable, than pea, the difference between the highest and lowest being 50 cents per ton.

It thus appears that as the price of bituminous coal has declined and its use relatively increased in eastern markets, the carriers have found it more and more necessary to so adjust their rates on anthracite as to make them proportionally less on the steaming or smaller sizes. In so adjusting the proposed reduction to the average of \$1.40 it is only prudent to maintain, as far as may be, the relations in the charges on the several sizes or qualities of coal which the carriers with their growing experience found it necessary to establish. To maintain these relations approximately with the highest rate at about \$1.45 as it was when the average was \$1.40, the lowest would be too nearly consumed in the expense to afford any reasonable profit. Still with the increasing supply of bituminous the smaller or ordinary steaming sizes of anthracite must reach the market at the lowest possible cost. The practicable

and necessary adjustment of the rates on such east bound, short distance traffic, which the commission determined upon as reasonable per ton of 2240 pounds from the collieries of complainants to Perth Amboy, is, on the prepared and larger sizes, \$1.50; on pea, \$1.25; on buckwheat and culm, \$1.05.

The charges so adjusted on the several grades or sizes of coal and applicable to complainants' shipments to Perth Amboy are not meant to affect or to establish the relation of the charges made or to be made on Buffalo and longer distance shipments where lower anthracite rates are maintained than are or may be in force on tide shipments.

The rates now determined upon are believed, say the commission, to be liberal for freight so inexpensive as coal, and if, after trial, it is found that they are too high, it will not hesitate to require further reductions; but in view of interests so vast as the east bound anthracite traffic which may be affected, it does not now feel justified in determining upon a lower scale of charges. In their petition and proposed findings complainants assume that the charges they may be reasonably required to pay must be based on the average distance from their several collieries to Perth Amboy, 135 miles, and not on the average or group distance from the Lehigh and Mahanoy anthracite fields, 149 miles, in accordance with the practice long in use. But the commission say it is often impracticable to establish different rates on the same commodity from practically the same locality to the same market. That under such circumstances some grouping is not unreasonable, complainants concede by asking that they may be charged on the average distance from their seven collieries, no two of which are the same distance from Perth Amboy. One is as near as 128 miles, while another is as far as 145 miles. The reasons which make necessary and justify the same charges from the several collieries of complainants would seem to justify like charges from all the collieries in the same coal fields and practically the same locality. The objection which is frequently urged against the equal charges from collieries or places of production variously distant is that such charges occasionally deprive producers of their natural advantages resulting from proximity to markets. This

objection, the commission assert, can have no application to questions to be determined in this proceeding. The complainants' mines and collieries are situate in the Lehigh regions, the nearest to eastern markets, and the charges are less to the east than the charges from the more distant Wyoming region, though not adjusted in proportion to distance. On western shipments all the anthracite fields are grouped together, and given the same rate, of which the complainants get the advantage, their collieries or some of them being among the most distant from western markets, and they suffer no undue disadvantage from the system of grouping in use under which their charges east are based, on a distance 14 miles in excess of the average from their collieries, while they have the advantage of the same rates on western shipments paid by their competitors located from 60 to 100 miles nearer to western markets.

Much stress was laid by defendant on the expense or cost of terminal service, incident to the transportation, as a justification of high rates. After most careful investigation the commission found it to be about 30 cents, or two mills per ton per mile, on shipments from the Lehigh and Mahanoy fields to Perth Amboy. This would leave to the road for the additional expense of transportation a trifle less than 4 mills per ton per mile if the entire terminal expense was included in the cost of transportation, a part of which terminal expense is included in the plant or investment. The charges of the Lehigh Valley Railroad Company under its reduced rates on anthracite coal from the Lehigh region to Buffalo are \$2, or 6 mills per ton per mile, and include the same terminal expenses at the mines as are incurred on Perth Amboy shipments. Said Lehigh Valley Railroad Company transports the coal carried by it to Buffalo over the lines and tracks of the New York, Lake Erie & Western Railway Company, for which said Erie Company receives one half of the freight charges. There is thus left to the defendant road but three mills per ton per mile for its transportation services, including terminal costs and profit or income on investment. When the operating expenses, which include the cost of collecting, weighing and making up into full train loads at Packerton, are compensated for, the haul thence to Perth Amboy is but one



hundred and twenty-five miles, and its cost is considerably reduced. The commission conclude that the scale of charges determined upon as reasonable are sufficient to meet all the expenses and obligations of the railroad company, including dividends on the capital stock, or a reasonable rate of income on the alleged investment. The terminal charges being thus provided for, their exact sum and apportionment, as between the expense and net profit account, is not essential to the ascertainment of the proper aggregate rates. An order was issued requiring the Lehigh Valley Railroad Company to cease and desist from making any charges after April 20, 1891, in excess of the rates determined upon.

In the case of *Haddock v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 302. the petition of the complainant shows:

*First.* That petitioner is and has been as hereinafter mentioned an owner of anthracite coal mines in Plymouth and Luzerne in the county of Luzerne, Pennsylvania, and an extensive miner and shipper of anthracite coal therefrom. That petitioner's mines are known as the Dodson and Black Diamond Mines, and have together a daily capacity of from 2200 to 2300 tons of coal.

*Second.* That defendant is a common carrier engaged in the transportation of passengers and freight by railroad between points in the state of Pennsylvania and points in the states of New York and New Jersey, and as such is subject to the Act to Regulate Commerce.

*Third.* That defendant is a corporation organized and existing under the laws of Pennsylvania, and is largely engaged as common carrier in transporting coal as interstate commerce from the Wyoming and Lackawanna coal regions in Pennsylvania eastward to tidewater at Hoboken, New Jersey, and westward to Buffalo, New York, and to intermediate points between said east and west termini, and to points beyond. That petitioner's mines aforesaid are located immediately upon the Lackawanna & Bloomsburg Railroad, which is a branch of defendant's railroad, that all or nearly all of petitioner's coal has been shipped as interstate commerce over the defendant's lines of railroad, and that petitioner has no other so convenient means of transport or carriage for his coal to market as the lines of railroad of defendant.

*Fourth.* That one of the principal markets for anthracite coal is in the city of New York, and that coal for points eastward from New York is delivered to vessels at some point in or about New York harbor and thence shipped to its destination. That there is nevertheless a valuable and growing market for anthracite coal to the westward of the anthracite coal regions of Pennsylvania. That the greater part of said westward traffic in anthracite coal over defendant's line of railroad is by way of the city of Buffalo, whence shipments are made by lake or transfer to other and connecting railroads.

*Fifth.* That in addition to petitioner there are other miners and shippers of anthracite coal, including the defendant herein, engaged in shipping anthracite coal as interstate traffic from said Wyoming and Lackawanna coal regions to various points in the states of New York and New Jersey and elsewhere over the line of defendant's railroad.

*Sixth.* That defendant is itself one of the largest owners of anthracite coal mines in the United States, its mines being located on the line of its own railway and in the immediate neighborhood of petitioner's mines, and it is the largest single shipper of coal over its own lines to Hoboken, and either the sole or almost the sole shipper over its lines westward.

*Seventh.* That petitioner's Dodson mines at Plymouth are 165 miles from tidewater at New York and 285 miles from Buffalo, measured on the line of defendant's railroad.

That petitioner's Black Diamond mines at Luzerne are 163 miles from tidewater at New York and 283 miles from Buffalo, measured on the line of defendant's railroad.

That defendant has a published rate or tariff of charges which it charges private miners and shippers of coal, but that it gives to itself as a miner and shipper of coal what is in effect an undue and unreasonable preference and advantage in the matter of rates, in that the said defendant in disposing of the product of its own mines, or in selling the coal which it buys from other collieries, does so at a price which will not cover the cost of mining coal at its own collieries, or the price it pays other operators, adding thereto a reasonable charge for selling expenses and the rate of

transportation it charges to other shippers and to petitioner. That said published rate or tariff at the present time is \$1.80 per ton of 2240 pounds on all anthracite coal shipped to Hoboken and delivered there free on board vessels, and \$2.50 per ton on all anthracite coal shipped to Buffalo, whether consigned to Buffalo or delivered there free on board vessels. That the rate charged by competing railroads for carriage of anthracite coal to Buffalo from the same region for the same length of haul, and under similar circumstances and conditions, is 25 and 50 cents a ton less than is charged by defendant.

*Eighth.* That the charges made by defendant for the handling and transportation of petitioner's coal to Hoboken, New Jersey, and delivery there on board vessels are unreasonable and unjust. That the charges made by defendant for the handling and transportation of petitioner's coal to Buffalo, whether consigned to Buffalo or intermediate points, or for delivery there to the other railroads or on board vessels, are unreasonable and unjust.

*Ninth.* That bituminous coal is like traffic with anthracite coal within the meaning of the Act to Regulate Commerce; that it comes chiefly in competition with the smaller sizes of anthracite coal, such as are commonly known as pea, buckwheat and culm, the production of which is not a matter of choice with miners, but such sizes result from the most careful manipulation of coal in mining and preparing for domestic use. That in the transportation of these smaller sizes of anthracite coal defendant discriminates in its own favor, and against complainant and other shippers, and that its charges for transportation made to other shippers than itself are excessive and unreasonable. That with the use of ordinary care and diligence to prevent waste and small sizes, there will result of culm and of pea and buckwheat each a large percentage of the total output. That the percentage of these smaller sizes now produced is greater than formerly, for the reason that the carrying rates of anthracite coal being unjustly higher than for the carrying of bituminous coal for a like and contemporaneous service, the large sizes of anthracite formerly used in manufacturing have been largely driven out of the market, and only the smaller sizes are shipped. In making such

smaller sizes, the percentage of culm, pea and buckwheat is greatly increased.

That were the prices charged for the transportation of culm, pea and buckwheat no higher than the prices charged for the transportation of bituminous coal, these products of the coal mines of your petitioner could and would find their way to market, but the price of transportation now charged by defendant is the same as for the larger size of anthracite, and that such price is not justified by the value of the article or the cost of transportation; that it is higher than the rate charged by other transportation companies for carriage of the same products, and is unreasonable and unjust. That in consequence of such unreasonable and unjust rate of transportation charged by the defendant, your petitioner cannot realize more than, or as much as, the cost of the transportation thereof as now charged, and these products therefore become waste. That the rates charged to petitioner for the transportation of his anthracite pea, buckwheat and culm to Hoboken and Buffalo and intermediate points are excessive and unreasonable.

*Tenth.* That by reason of the unjust advantages secured to itself by such discriminations and by the unjust and excessive rates charged to private miners, the property and power of defendant have now become so preponderating that three fourths of all the coal tonnage carried by defendant eastward is its own coal, and all or nearly all of its westward coal tonnage is its own coal, either mined or purchased by it, and that the same is true of all the railroads carrying coal from the Wyoming and Lackawanna regions. That the rates charged by defendant and other roads to private shippers are for the most part uniform, and that by conspiracy and combination as to rates, and by a limitation of the quantities shipped, defendant and other railroad companies are able to and do control the market price of coal, and in effect unlawfully restrict the uses to which anthracite coal shall be put, and in many instances compel the miners to sell their coal at the mines to the railroad companies, at a price dictated by the latter, to the great damage of petitioner and other miners of anthracite coal.

*Eleventh.* That the anthracite coal carriers, by charging a very high rate for carriage, make the market price so high that its sale is cut off except for uses for which bituminous coal is not fitted. By reason of the high tariff on anthracite and the low tariff on bituminous coal, anthracite is largely displaced and driven out of the market for use in manufacturing and making steam. That the uses of anthracite coal are confined, by reason thereof, mainly to domestic use. That one result of this restriction of market is that, when, as is usually the case at some time during the year, the demand becomes sluggish and the market price is lowered, and the rates of transportation being nevertheless maintained at a point which makes it impossible to ship coal at a profit, the mines are then shut down and the miners thrown out of employment until the stock in market is reduced and prices are again advanced and mining resumed. That the result is injurious and hurtful alike to the private owners and to the miners.

*Twelfth.* That the rates charged as aforesaid to petitioner constitute an unlawful and inequitable discrimination against him and all others similarly situated as shippers, against his and their business as interstate traffic, and against the region of country in which he and they operate and conduct the business aforesaid.

*Thirteenth.* That it is contrary to public policy and to the constitution of the state of Pennsylvania that the same person should be a common carrier and a miner and shipper of coal. That such double relation to the coal traffic inevitably results in unjust and burdensome discriminations by the carrier against private miners and shippers of coal and dealers therein. That defendant, in violation of said constitution and since its adoption in 1874, has acquired and owns and operates coal mines in the state of Pennsylvania and sells their products in competition with petitioner. That such offense against public policy and the constitution of Pennsylvania is equally contrary to the provisions of the Interstate Commerce Act. That defendant also, contrary to law and public policy, purchases from other miners large quantities of coal at the mines, not for its own use, but to be afterwards dealt in and sold as merchandise in competition with petitioner's coal. That the profits of carrying the coal are constantly and inevitably

increased to a point which barely permits the private coal miner to ship his coal without loss; that he is often in effect compelled to sell his product to the railroad company at its own price at the colliery, or antagonize its power and encounter its arbitrary and excessive transportation charges, its grudging, irregular and capricious supply of facilities and its competition as a dealer able to dominate the market. That the holdings and ownership of coal lands and coal mines in the anthracite region by railroad companies, including defendant, have constantly increased, both in absolute quantity and in proportion to the whole, to such an extent that now nearly or quite three fourths of the anthracite coal mines and fields in the United States are owned directly or indirectly by the defendant and the other railroad companies running into that region. That such preponderance and power in the hands of a few corporations place private and noncorporate owners and miners at a great and dangerous disadvantage and leave them at the mercy of their powerful rivals, unless the commission shall compel them to make such charges for transportation as are just and reasonable, and to abstain from all unjust discriminations.

*Fourteenth.* That petitioner is at a greater disadvantage in his dealings with the defendant than are other miners and shippers of coal over its lines, inasmuch as defendant is mortgagee of petitioner's mines; and further because of contracts regarding the transportation of his coal entered into by petitioner at or about the dates of the said mortgages to defendant, and which at the time he deemed it expedient and necessary for him to make, in view of the dominating power of the defendant over his business. That defendant, under such transportation contracts, claims that petitioner is required to ship all his coal over defendant's railroad; that if such claim be well founded, it is of the greater importance to petitioner that the said defendant shall be strictly held to the requirement that its charges shall be reasonable and just, and that there shall be no unjust discrimination in any form against petitioner. That petitioner avers that there is nothing in said mortgages or contracts which gives to defendant the right to impose upon petitioner unjust or unreasonable charges for trans-

portation, or to discriminate against him in any manner. Petitioner prays that order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the commission may deem necessary in the premises.

Respondent filed answer to this petition, admitting ownership of the mines known as the "Dodson" and "Black Diamond" mines by the complainant; admitting the ownership by itself of railroad lines as stated, and that it is engaged, as charged, in the transportation of anthracite coal purchased and mined by itself in pursuance of authority contained in its charter, and also of freight for other corporations and persons; that it transports coal for others, including complainant, as well as its own coal, from the Wyoming and Lackawanna coal regions in Pennsylvania eastward to tide water at Hoboken, New Jersey, and westward to Buffalo, New York, and to intermediate points between such east and west termini and to points beyond. It admits the allegations in the 4th, 5th, 6th and 7th paragraphs of the petition, and denies those in the 8th, 11th and 12th paragraphs. It admits that it has a published rate or tariff of charges to shippers of coal of \$1.80 per ton of 2240 pounds of anthracite coal to Hoboken, delivered free on board vessels, and \$2.50 per ton on like coal shipped to Buffalo, but denies that complainant was charged those rates for reasons hereinafter stated; admits that other carriers charge less on coal to Buffalo by 25 to 50 cents a ton, but says their rates are unreasonably low, and defendant is unwilling to accept the same; denies that bituminous coal is like traffic with anthracite within the meaning of the Act to Regulate Commerce; admits that certain small sizes of coal, known as culm, pea and buckwheat, result from the manipulation of anthracite coal in mining and preparing it for market, and that these small sizes are less valuable than the larger sizes; denies that any of its rates for transporting any sizes of anthracite coal are unreasonable or unjust: denies that bituminous and anthracite coal can properly be compared as to cost of transportation; admits that it carries more coal for itself than for others, but denies that the preponderance of its own traffic is by reason of unjust advantages secured

to itself or of unjust or excessive rates charged to others ; admits that the rates charged by it and other roads to private shippers are for the most part uniform ; claims that having received its charter before the present constitution of Pennsylvania was adopted it is not subject to the provisions therein which might otherwise affect its business.

The answer then proceeds to say that at the request of complainant, and for the purpose of enabling him to purchase said Dodson and Black Diamond mines, or an interest therein, or to discharge liens thereon, and to enable him to operate said mines, the defendant has from time to time advanced him large sums of money and given him at his request contracts for the transportation of the products of his mines at favorable rates, and has at his request entered into agreements for the repayment of said advances in small installments, and proceeds to set forth contracts, agreements, bonds and mortgages, marked, respectively, Exhibits from 1 to 13, inclusive, to show the facts ; all of which were entered into previous to the passage of the Act to Regulate Commerce. It avers that complainant, since the passage of that Act, has insisted upon the continuous validity of the agreements for transportation, and defendant has acquiesced ; asserts that the terms upon which defendant must transport the coal of complainant are found in said contracts ; that defendant has not deviated from the line of its obligations and duties under the same, but if it has, the remedy of complainant is in the courts ; and it therefore prays that the complaint be dismissed.

To this answer were attached as exhibits copies of several agreements which are referred to therein. Exhibits Nos. 1 and 2 are an agreement for a loan and a bond for the money loaned, dated February 24, 1882. Exhibit No. 3 is the abstract of a mortgage deed for the loan. All these are between the defendant and John C. Haddock and Charles F. Steel, who are the borrowing parties. Exhibit No. 4 is a contract between the same parties for the transportation of the coal of Haddock & Steel from their colliery, located on the mortgaged lands and known as the "Black Diamond" colliery, to Hoboken in the state of New Jersey. The provisions of this contract important for the purposes of this pro-



ceeding are that Haddock and Steel shall deliver to the railroad company loaded in its cars at the said colliery for transportation to Hoboken all the coal which they have a right to mine and remove from said lands at the rate of 150,000 tons of 2240 pounds of coal annually till the whole is removed and delivered, the same to be in as nearly equal daily deliveries as may be practicable, Sundays and the usual holidays excepted, the railway agreeing to furnish cars for the purpose. There are then the following agreements: "And the said parties of the first part agree to pay the said party of the second part for the coal transported as aforesaid at the rate following, to wit: For the coal transported to Hoboken, as aforesaid, and then by the said party of the second part transferred from the cars into vessels provided by the said parties of the first part, the rate shall be fifty per cent of the average price per ton at which the said party of the second part shall have, during the month in which said coal is transported, sold and delivered their own coal, delivered on board of vessels at Hoboken aforesaid, in ascertaining which price no coal below the size known as 'pea' shall be taken into account, which payment shall be made on the 'eighth,' 'fifteenth,' 'twenty-second' and last day of every month at the office of the said party of the second part, in the city of New York, in funds par in said city. And for the purpose of ascertaining the amount to be paid on said days, it shall be assumed that the average price at which the said party of the second part sold and delivered their own coal on board of the vessel at Hoboken during the preceding month was the same as the price during the then present month, and payments shall be made upon that assumption, subject to adjustment when the price for the present month is ascertained.

"And the right of the said party of the second part, to be paid for said transportation and handling, shall be held to have accrued as soon as the coal arrives at Hoboken, or such point convenient thereto as may be provided for the standing of loaded cars, even though the coal, for any reason, had not been transferred into vessels.

"The said parties of the first part may send such portion of the said coal as they shall desire to such points and places north

and west upon the same terms and conditions as the said party of the second part for the time then being transports coal for other parties over the railroad of the said party of the second part.

“And in case the said parties of the first part shall at any time fail to pay the said party of the second part as hereinbefore provided, for the transportation or handling of any part or portion of said coal, the said party of the second part shall, in addition to all other legal remedies for securing and collecting the same, have the right to take, and, in such way and manner as the said party of the second part may deem proper, sell and dispose of any and all of the coal of the said parties of the first part, which may be in the cars of the said party of the second part, at the aforesaid colliery or collieries, or at any other place, or in transit or in stock, and to apply the proceeds in payment of the amount due the said party of the second part, for transportation of said coal, or due and unpaid for the transportation of any other coal, returning the excess, if any, to the said parties of the first part.

“And in case of the failure of the said parties of the first part to furnish for transportation the coal as aforesaid, or to pay for the transportation thereof, as the same may become due and payable, the said party of the second part may take possession of the mines and improvements of the said parties of the first part, in the way and manner as hereinafter provided.

“The number of tons transported shall be ascertained by the weights of said coal, as weighed in the cars of the said party of the second part, at the colliery aforesaid, by a person to be approved by the general coal agent of the said party of the second part, and paid by the said parties of the first part, upon a suitable scale to be provided by the said parties of the first part, and in weighing the same the usual allowance to compensate for snow and ice that may be on the coal or cars, as is customary to be made by the said party of the second part in weighing its coal, and for dust and wastage in transportation, provided for in existing transportation agreements made by the said party of the second part, shall be made.

“And the said parties of the first part further agree to furnish, and have placed at such points as the said party of the second

part may direct at Hoboken, aforesaid, vessels for the reception of at least eighty per cent of the said coal, so that the said party of the second part can transfer the same directly from the cars into vessels within twenty-four hours from the time of the arrival of the cars containing said coal at Hoboken, or at such place convenient thereto as the said party of the second part may have or provide for the standing of loaded cars.

“And the said party of the second part further agrees to provide stocking grounds at or near Hoboken, aforesaid, for the storing of, and to unload and store so much of, said coal, not exceeding twenty per cent thereof, as is not transferred directly from cars into vessels, and when vessels to receive the coal thus stocked are furnished, shall load the same into vessels. Should the said parties of the first part fail to furnish vessels so as to enable the said party of the second part to transfer at least eighty per cent of said coal directly from the cars into vessels within twenty-four hours, as aforesaid, the said party of the second part may at their option discontinue furnishing cars for the reception of coal at the said colliery until vessels are furnished as aforesaid,—it being understood and agreed that the said party of the second part shall not be bound to furnish stocking room for more than six thousand tons at any one time.

“The average net price the said party of the second part shall sell their coal on board vessels at Hoboken shall be determined by a written statement made by the treasurer of the said party of the second part.

“And the said party of the second part further agrees that if at any time a general reduction in the rate hereinbefore provided for transportation of coal to Hoboken is made to other shippers of coal, the said parties of the first part shall be entitled to the benefit of the same, while such reduced rate is in force. And the said party of the second part shall have the right to the use of so much land at or convenient to the said colliery as they may require for a car repair shop, with the right to remove the same at their pleasure, prior to or upon the termination of this agreement.

“If by reason of strikes among the employes of either party

(even though such strikes should be caused by a reduction of wages) or by reason of injury to the works, buildings or fixtures of either party, or delays, or obstructions to the mining or transportation of said coal, either party should be temporarily disabled from furnishing or transporting said coal as hereinbefore agreed, neither party shall, for such temporary nonfulfillment of this agreement, be liable to pay damages, if reasonable exertion is made to remove such disabilities.

“And it is further agreed, by and between the parties hereto, that the said parties of the first part shall have the right, upon giving three months’ written notice to the general coal agent of the said party of the second part of their intention so to do, to increase the annual deliveries as aforesaid to three hundred thousand tons per year. And after having given such notice, they shall thereafter be bound to deliver for transportation as aforesaid, to the said party of the second part, such additional quantity annually during the term of this agreement.”

This agreement bears the same date with the other papers above mentioned. Exhibit No. 5 is a similar agreement made between the Plymouth Coal Company, by John C. Haddock, Chairman, and the respondent company, for the transportation of coal from the Dodson mine to Hoboken, aforesaid, and to Syracuse in the state of New York, on substantially the same terms, the rate for transportation from Syracuse to “be such as the said railroad company may from time to time fix, not exceeding the rates charged other parties similarly situated, whose coal is destined to the same market.” This bears date February 25, 1879. Exhibit No. 6 has no importance in this controversy. Exhibit No. 7 is another agreement of complainant with respondent for the transportation of coal from the Dodson colliery. Exhibits Nos. 8 to 13 inclusive all have reference to the same general subject of loans from respondent to complainant, and of the transportation by respondent of complainant’s coal from the collieries mentioned. The transportation agreement first mentioned sufficiently shows the terms of all the agreements for transportation put in evidence, and the subsequent agreements are therefore not further mentioned or given.

The case being thus at issue complainant on affidavits filed showing cause therefor made application for subpoenas *duces tecum* addressed to Samuel Sloan, President; E. R. Holden, Second Vice President; William R. Storrs, General Coal Agent, Frederick H. Gibbens, Treasurer, of the respondent company, and various other persons named, requiring the production of books, accounts, papers, etc., and, among other things, calling for contracts, agreements and documents in possession of the person named, or under his control, "relating in any wise to the matters hereinbefore specified, or to any other matter whatsoever in issue in this proceeding as the same is disclosed by the pleadings herein." What was required of each person is specifically mentioned, but it is not deemed necessary to state in detail here.

When this application for subpoenas *duces tecum* was called up, motion was at the same time made on behalf of the respondent to dismiss the whole proceeding upon the ground that it presented only judicial questions, and did not, therefore, come within the jurisdiction of the Interstate Commerce Commission. The basis of the motion in general terms may be said to be this, that the parties had by their contracts fixed for themselves definitely and conclusively their rights in respect to the transportation of complainant's coal, so that if the complainant was in any respect wronged in regard to such transportation the wrong was one for which he had ample redress in the courts.

The application of the complainant and this motion to dismiss were taken up and argued before the commission by counsel at the same time. Upon the argument neither party raised any question of the original validity of the contracts for the transportation of the coal mentioned. Nor was it claimed that any subsequent legislation, state or national, had in any manner had the effect to nullify or change the legal obligations of the parties under them. The question was put distinctly by the commission to the counsel of both parties, whether it was claimed that the contracts in any respect had been changed or modified in their legal operation or put an end to by the Act to Regulate Commerce, and the reply was understood to be positive that such a claim would not be advanced. The parties differed in their con-

struction of the contracts, and in their understanding of their rights respectively under them, the complainant insisting among other things that they were to be construed in harmony with the provisions of the constitution of Pennsylvania hereinafter referred to, but the argument all proceeded upon the assumption that when a correct understanding of the contracts was reached the obligations of the parties must be determined thereby so far as they were found to govern the case. The fact that respondent is a large owner of coal lands upon which it is engaged extensively in the mining of coal and transporting the same to market over its own lines, and that it also purchases and deals in coal not mined by itself, and that this is done by authority of state law, was taken on the argument as undisputed, and it was by the commission assumed to be so. Inasmuch as the parties raised no question of the validity of the contracts for transportation, or of their having been affected by subsequent legislation, the Interstate Commerce Commission did not consider that question, as it was not in fact involved under the presentation of the case.

On the argument counsel for complainant presented a statement of facts expected to be proved on the hearing, prefacing it with his view of the effect of the contracts upon the matters in controversy, namely: "The contracts pleaded by the defendant cover but two points on the subject of rates; (first) they provide that the whole product of complainant's mines shall be transported to market by defendant, and they provide a maximum rate to Hoboken; (second) they concede on behalf of the railroad, as to west bound traffic, the common law obligation of a carrier not to discriminate against the shipper, which is now, both in Pennsylvania and under the Act to Regulate Commerce, a statutory obligation."

The offer of proof covered all the facts set forth in the complaint, and went further into detail as to the policy and practice of the respondent whereby it succeeded in absorbing to itself and absolutely owning and controlling five sixths of the total amount of anthracite coal transported over its lines. The excessive rates of the respondent, it was asserted, precluded complainant from having more than a limited market for his small sizes of coal,

though respondent transports and markets its own small sizes to complainant's loss and damage. It was proposed to be shown that the discriminations of defendant as a common carrier in favor of itself as a miner, and against all other shippers of coal, tends to create a monopoly in its favor in the anthracite coal business along its lines; that such discrimination is destructive of the rights of property of complainant; also that there is a growing market for the smaller sizes of anthracite coal from which complainant is wholly shut out by the practices and policy of the defendant; also that there is a growing market for what are known as the commercial sizes of anthracite coal throughout the west from which the practices and policy of the respondent shut out the complainant; also that the aggregate prices at which respondent sells its coal at specified northern and western points is less than the cost to complainant of mining his coal plus the open rate which is charged him for transportation to those points, and hence a most destructive competition is established against the complainant. This brief statement will be sufficient for the purpose of an understanding of what follows.

Upon this statement counsel for the complainant presented certain points which they argued with great force and earnestness.

*First*, it is said that so far as the complaint charges discrimination in rates upon shipments of small sizes, that is, upon buckwheat and culm, the matter is entirely outside of the contracts put in by respondent, for the reason that those sizes as marketable sizes of coal are products which, commercially speaking, have originated since the contracts were entered into—the contracts themselves being silent upon the rates for those sizes—and for the further reason that for the existence of those sizes at present in any considerable quantity, the recent policy and practices of the respondent are chargeable. The matters of fact here asserted the complainant proposes to establish, but for the purposes of the case the commission did not consider them of legal importance. The commission state that they have carefully examined the contracts attached to the answer, and are all of opinion that they cover, and were evidently intended to cover, all shipments of coal by the complainant. Whether he had in view

at that time these small sizes of coal as a marketable commodity which he might ship to Hoboken or other distant points, or whether they were then produced as marketable commodities by any one, are not questions that can affect the construction of the contracts themselves. Their terms are as broad as they could well be made. They are to cover "all the coal" which the contracting parties of the first part were to mine and remove from their lands, and are not limited to coal of any particular sizes or to coal which was then marketable. If complainant relies upon these contracts there is, in the opinion of the commission, no escape from the conclusion that he has by their terms precluded himself from raising the point which is presented. The contracts, though they clearly imply both the existence of coal of smaller sizes than pea coal and that they are marketable commodities at Hoboken, make no distinction between them and coal of the common sizes, except as it excludes them from being taken into consideration when the price of transportation to Hoboken is to be determined. But that price is a price for the transportation "of all the coal" which complainant is to ship to that point, and he undertakes to pay it. He cannot, the commission say, make an exception to the contract now because of subsequent facts rendering it important, nor because the facts are such that he would unquestionably have insisted upon it at the time had he foreseen what was to occur. Nor can the policy or the misconduct of the respondent change the construction of the contracts. They may perhaps be such as to give to the complainant a right of action at law, but such an action would be founded on something outside the contracts, and would not at all relieve the complainant from the obligations he had assumed in entering into them.

This being the commissioners' view of the contracts, and it appearing very clear that the complainant has thereby bound himself as to what the prices for the transportation of the coal to Hoboken shall be, and how determined, and that the reasons that governed the parties in fixing the terms of their contracts are not open to inquiry in this proceeding, which has not for its object the avoidance of the contracts, it follows as a necessary consequence that the complainant is not entitled to go into evidence



called for by his motion, by which he proposed to establish the fact that for the transportation of these smaller sizes of coal to Hoboken the price ought to be something different than that fixed by the terms of the contract. All the evidence called for for that purpose, and all the witnesses proposed to be examined to that end, are made by the contract itself entirely immaterial. Nor do the commissioners regard the suggestion that the respondent may not have rendered true statements, or full statements, or indeed any statements at all, for the purposes of fixing the prices of transportation to Hoboken according to the terms of the contracts, of any moment whatever. If the fact is so there may be a remedy in the courts, but there is none before the Interstate Commerce Commission. If the rate of transportation were not fixed by contract it might have jurisdiction to determine what it ought to be, but when the contracts made by the parties themselves have undertaken to determine how the rates shall be fixed that matter is taken entirely out of its hands. This is said assuming that the contracts are valid, just as the parties assume them to be.

*Second*, it is said that so far as the contracts pleaded by the defendant assume to fix the rates upon shipments of coal north and west, they were at the time the said contracts were made merely declarative of a general rule of law which was then part of the statutory law of the state of Pennsylvania, and has since become part of the statutory law of the United States, and the contracts can therefore in no wise affect the present controversy so far as those rates are concerned. In support of this position sections 3, 5 and 7 of article 18 of the Constitution of Pennsylvania of 1874, and also the act of the legislature of that state of June 4, 1883, forbidding unjust discriminations, are quoted; also the case of the *Wabash, St. Louis & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, asserting the paramount authority of the United States government in matters of interstate commerce; also the cases of *Skinninggrove Iron Co. v. Northeastern R. Co.*, 5 Ry. & Canal Traffic Cas. 244, decided by the English Commissioners; and of *Poughkeepsie Iron Co. v. New York Cent. & H. R. R. Co.*, 3 Inters. Com. Rep. 248, re-

cently decided by this commission, from which the conclusion is deduced that when the carrier is also a producer, and especially on its own behalf, it is illegal for it to discriminate in its own favor as against other shippers.

It is further said, *thirdly*, that so far as the contracts pleaded by the respondent can in any respect be regarded as affecting this controversy they are to be read herein only as a tariff or a maximum rate sheet—the wrongs complained of being wrongs sustained by the complainant within and independently of such maximum rates, and being entirely aside from the contracts themselves. The case of *Aberdeen Commercial Co. v. Great North of Scotland R. Co.*, 3 Ry. & Canal Traffic Cas. 205, is supposed to cover this contention.

It is further, *fourthly*, said that the defendant can no more set up these contracts as a defense, when it is itself, as a common carrier, charged with wrong-doing, than the complainant could plead the contracts for the purpose of enforcing as against the respondent a discrimination in his favor, and to this *Hurlburt v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 81, and *Bullard v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 576, 11 L. R. A. 246, 10 Mont. 168, are cited.

It is further said, *fifthly*, that the respondent, as a common carrier of goods for hire, can no more discriminate against the complainant in favor of itself as a producer and shipper of coal, than in favor of any other shipper. Discrimination by a carrier in its own favor is the worst form of discrimination, and is clearly within the mischiefs intended to be prevented by the Interstate Commerce Law.<sup>1</sup>

It is further contended, *sixthly*, that the defendant, being a common carrier for hire, and enjoying franchises from the public by reason thereof, cannot lawfully, under the peculiar circumstances and conditions under which the anthracite coal business is carried on, do business, in its capacity as a miner and shipper

<sup>1</sup> The case of *Barendale v. Great Western R. Co.* 1 Nev. & McN. 202, is cited; also *Garton v. Bristol & E. R. Co.* 1 Nev. & McN. 218; *Reynolds v. Western New York & P. R. Co.* 1 Inters. Com. Rep. 685; *Riddle v. Pittsburg & L. E. R. Co.* 1 Inters. Com. Rep. 688, 787; *Heck v. East Tennessee, V. & G. R. Co.* 1 Inters. Com. Rep. 775, and others.

of coal, at a loss, or in such a way that an apparent loss in mining can result in an actual profit to the respondent only by the prostitution of its franchises as a common carrier. The case of *Rice v. Western New York & P. R. Co.*, 3 Inters. Com. Rep. 162, recently decided by the commission, is cited as bearing upon this contention.

All these points, from the second to the sixth inclusive, it is seen the commission elaborate and present in different forms the one main contention as regards shipments to the west and north under these contracts, that the respondent as a common carrier of interstate traffic, being also a producer and purchaser and shipper on its own account, is by law precluded from unjust discrimination in its own favor; that any such unjust discrimination subjects it to the discipline of the Act to Regulate Commerce, and brings it within the regulating power of this commission. It is to this general contention that we shall now direct what we have to say. The commission in discussing this general contention, assume that the underlying principle of the complainants' contention is sound and just. It is said, the respondent is a common carrier, charged with duties to all who may present themselves for carriage or offer their property for that purpose, and one of the highest of these duties is that it shall not discriminate as between those thus offering. This is the obligation of the common law, and of the constitutional and statutory law of Pennsylvania as well. Whether by the contracts brought into the case there was discrimination as between the complainant and other persons, of which such other persons might find fault, is a question not in any way involved in this proceeding. The assumption is that the contracts were valid when made.

But the situation is peculiar, and elsewhere than in the coal regions of the country would be regarded as extraordinary. Respondent is not only a carrier for all other persons who may offer, and charged with duties of impartiality as such, but it is also itself a shipper over its own lines. It may be said to offer to itself property for transportation, and this not merely casually and for some temporary or special purpose, but regularly and as a very large part of its business. Indeed, it is probably true that

respondent became a carrier because of having immense quantities of property to be carried, and that its line was constructed mainly for its own purposes as owner and shipper, the business of common carrier being added to that of producer and dealer in coal with a view to an additional profit or to lessen the cost of conducting the primary business. The situation is what creates the difficulty in dealing with the case. It presents the question of impartiality in such a manner that it may not be possible, the commission admit, to deal with it as it would in general be dealt with if it were to arise as a question affecting rights as between third parties who were shippers only. It might be easy to apply the rule against unjust discrimination in that case, while it might be difficult to call it a rule against unjust discrimination in this case. The right of the complaining party might be precisely the same in each case, and yet the situation might make the method of enforcement quite different, and might even require that a different term should be applied to the wrong from which the complainant suffered. But the commission say no matter what the situation is, the respondent must not use its power and the means at its disposal as a carrier to avoid performing the full measure of its duty. It must not use them oppressively. It must, as far as possible, deal as between all shippers, including itself as a shipper, in such a way that all shall have proportional benefit whenever demanding its service.

But the inquiry arises how is it to be determined whether the respondent discriminates as between itself as shipper and some third party shipping coal over its line? This is not the case of two artificial bodies, the one a coal company and the other a railroad company, both composed of the same persons and in absolutely the same interest, but it is the case of one artificial body carrying on two kinds of business. Complainant insists that in order to determine whether the respondent discriminates in its own favor in the matter of transportation it is necessary that an account should be kept as between itself as carrier and itself as a shipper of coal. This will enable other shippers and the public authorities to ascertain what the cost of transportation is, and thereby the proper charge for transportation against the respond-

ent may be determined, which charge must not be exceeded for the carriage of coal for others. The respondent insists, on the other hand, that any such account would be mere bookkeeping; that the results would be of no interest and no importance to the complainant; that it would not measure the charge to be made to him, for that is measured by the contract itself, which provides that he is to be charged what others are charged on the shipments to the north and west. But this the complainant insists would leave the respondent at liberty to discriminate at will as against him and others, and in fact to shut him entirely out of northern and western markets by the delivery at such markets of its own coal for sale at prices below its charge for carriage.

It was not understood to be claimed by complainant or admitted by respondent at the argument that any account was now made by respondent of the cost of transportation of its own coal. The understanding of the commission is that no such account is kept. The keeping of it, so far as respondent is concerned, if no interest of third parties were involved, would have no importance, except as it might enable it to determine at what price it could afford to offer its coal for sale in markets at a distance from the colliery; and the management might well suppose that for this purpose it was needless to its interests. It can very well be understood that they might not care to be at the trouble and expense of such an accounting.

Can the commission oblige them to keep such an accounting if they have none now? What authority can it exercise for that purpose? It is not suggested that it would fall within its province to do so, except as it may be necessary to prevent unjust discrimination. But would it have any value to that end. The cost of the transportation of any one article of commerce over the line of a public railway can never be arrived at with anything like accuracy. If the carrier did but one kind of business, it might at the end of the year very easily average the cost as between the shipments by quantity; but this respondent carries persons, and it carries an infinite variety of articles of property,—sometimes thousands of these articles by a single train, sometimes only one article by the same train, this last being generally true when coal

is transported. It is not possible to apportion either the interest, if any, upon its indebtedness, or the cost of maintenance of road and equipment, or the general cost of management, as between various branches of its business as carrier, so as to reach the proper proportion to be charged to each, with even an approach to accuracy. Such carriers endeavor to apportion the cost of passenger and freight service, but it is necessarily done very largely by estimates, and in some particulars by arbitrary allotments of items of expense, which may make an apportionment sufficient for its own purposes and to give the public some general idea of what the cost is of the two branches of the service. But that is all. Should the attempt be made to make a similar apportionment as between the various kinds of freight carried, the elements of uncertainty that would necessarily be dealt with would increase and multiply at every step. If the carrier desired to make the cost of any particular traffic appear large or appear small, it would not be difficult to swell it or to lessen it by such figures as would appear perhaps equally plausible in each case, but which, nevertheless, would not be such in either case as ought to determine the rights of third persons.

The commission felt compelled to say, therefore, that if this carrier were required to keep such an account as the complainant insists it ought to keep, it would necessarily be one that could not be relied upon as absolutely or even approximately accurate, because accuracy is not predicable of it. If the account could be once made out under the direction of the commission upon a basis that would be satisfactory to both parties to this controversy, it would still be necessary in order to keep it so that the commission should assume and exercise continuous supervision thereafter of the making up of the subsequent accounts, determine the items that should go into them, see to the apportionment of cost as between all the various kinds of traffic. In short, to assume general supervision of the respondent's books so far as they showed its financial transactions, since nothing short of this could render it impracticable for the respondent to so manage its accounts and apportionments as to accomplish deception and effect the very purpose which the making of the account is intended to preclude.

The commission cannot, it is said, order any such account to be kept. First, it has not the power. Second, if it had, it would be impracticable when its own duties in other directions are considered. Third, it would be useless if done. It could form no safe guide in determining whether the respondent did or did not use its power as a carrier oppressively.

But, on the other hand, when the respondent says that the contract fixes what should be paid by complainant for shipments to the north and west, the statement is inaccurate. Complainant is at liberty to ship his coal to such points and places north and west as he shall desire, upon the same terms and conditions as respondent for the time being transports coal for other parties. That is his right. Now, respondent says that it has certain definite rates fixed and published for the transportation of coal north and west, and, in substance, that it has a right to charge those rates for the transportation of complainant's coal. Complainant says that those rates are prohibitive; that it is impossible that he should do business under them; and the intimation is that they are made prohibitive purposely, that the respondent may transport its own coal to the markets north and west and sell it below the published rates of transportation; and these rates are further asserted to be unjust and unreasonable.

It is, the commission say, no answer for the respondent to say that the rates as published are such as are charged to third persons. Any third person has a right to complain of these rates as unjust, oppressive and unreasonable, and if such a complaint were to be brought to the attention of the commission, it must be inquired into, and if the rates were found to be as charged, it must order that they be reduced. The complainant would have the benefit of that reduction, just as much as the complaining party would; but complainant has the same right to arraign the rates as being unreasonable that any other person has, and he would have this right if there were no other shipper to the north and west over respondent's road. The complainant makes that complaint here, and he is entitled, the commission decide, to a hearing upon it.

The question, then, as between the complainant and the re-

spondent in this case should rather be called a question of reasonable rates than a question of unjust discrimination, for the reason that, as already shown, there is, from the very nature of the case and because of the situation—the respondent being both carrier and shipper—a situation that the commission must now assume it can in no wise change or alter, an absolute impossibility of applying any definite rule whereby unjust discrimination can be determined. Complainant is entitled to reasonable rates on all shipments, where he has not agreed upon a rule for determining the amount, as he has on those to Hoboken; and what are reasonable rates is to be determined in view of all the circumstances of the case. The rule of evidence for this purpose ought to be an exceedingly liberal one, and all those circumstances which the carrier may properly take into account, in order to determine at what it could afford to carry this species of traffic, or what it would be politic to charge, ought to be considered.

It would be out of place for the commission, in these preliminary proceedings, to undertake to point out in detail what facts might be shown when that question is gone into. Counsel understand very well what they are entitled to show upon a question of this kind. It was not thought by the commission improper to say that, among the facts to be taken into account, may very well be the market value of the coal at the colliery, and the market value, or at least what the coal is sold for, at the points to which the complainant desires to ship—Syracuse, Buffalo, or any other. And what respondent sells for at those points is clearly admissible, when the question of value is under consideration, and also as having some bearing upon the question of reasonable rates. The transportation cost will be assumed to be the same whether the coal carried be respondent's own coal or complainant's coal. It is probable, at least, that respondent does not sell its coal in distant markets without realizing some profit both upon the mining and the transportation. If, in its capacity as dealer, it established a price in some market, the question may at least be discussed whether it does not thereby furnish a basis by which a reasonable rate for other dealers may be arrived at; whether it does not fix a maximum of the charge it can make to others.



However that may be, the extent of its own profits upon coal marketed, compared with the rate it charges other dealers for transportation, or whether it makes any profit at all, may well be inquired into by any tribunal authorized to pass upon the reasonableness of rates.

By its motion for subpœnas *duces tecum* complainant is understood by the commission to desire to obtain, as instruments of evidence, among other things, certain contracts for the sale of coal made between respondent and third parties. If such contracts were put in evidence they might show, perhaps, what respondent is receiving for its coal at some of the points of delivery. But that is a fact that it is entirely competent to prove by any person in respondent's service who knows the facts, and also by any third party, purchaser or otherwise, who may know the facts. But complainant is not entitled to call for the contracts themselves for this purpose. Third persons have rights in such contracts. They would have a right to object to the contracts being produced if they themselves were present at the hearing, but they can certainly lose no rights by reason of being strangers to the proceedings and not present. They may, for aught the commission know, be matters in their contracts by which neither this complainant nor any other individual of the public has any concern whatever or any business to inquire into. For the purpose of ascertaining the selling price of coal it is not necessary that the production of the contracts be required, and, as has been said, parties interested in them, and who are not here to consent to their being produced, might rightfully object if they were here. Without passing specifically upon the application for subpœnas *duces tecum*, the commission think it advisable that no such subpœnas should now be issued. Some that have been asked for could not be issued for the reason above assigned. So far, also, as they seek to obtain an accounting in respect to eastern shipments, the subpœnas should not be granted for the reason that it must be had, if at all, in the courts. In respect to the reasonableness of rates upon shipments to the north and west, it is advisable that the testimony be taken in the ordinary way, and when the time comes for taking it the respondent will be expected to produce

for the purposes of examination any books or papers of its own that may seem to be relevant and that may properly be called for, but it should not be required to make exhibit of any dealings with third persons, unless their bearing upon the controversy is manifest. If a long examination of books and papers is probable, it might be well, the commission suggests, perhaps, if the parties should agree upon the taking of the testimony before a commissioner. It might prove a saving of time and labor to them as well as to the commission.

The motion for the dismissal of the complaint was denied, as the complainant sets forth sufficiently a good ground of complaint in respect to northern and western shipments. The decision as made will very much narrow the scope of future investigation, since it will necessarily exclude whatever belongs under the contracts to the judicial tribunals.

A carrier cannot rightfully establish rates in order to keep on its own line material for which it has use, or to keep the price low for its own advantage.<sup>1</sup>

<sup>1</sup> *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L. R. A. 105, 132 Ind. 517.

## CHAPTER XX.

### FREIGHT CHARGES, AFFREIGHTMENT AND CARRIER'S LIEN.

§ 126. *Freight Charges.*

§ 127. *Contract Rates on Freight.*

§ 128. *Carrier's Lien for Charges.*

§ 129. *Sale to Enforce Lien on from Necessity.*

§ 130. *Lien of Contract of Affreightment.*

§ 131. *Overcharge on Freight—Underbilling.*

§ 132. *Rate Sheets.*

§ 133. *Rebate.*

#### § 126. *Freight Charges.*

The law makes it the duty of every common carrier to receive and carry all the goods seasonably offered for transportation and authorizing a reasonable reward to be charged for services. The amount to be paid is for the jury, subject to the agreement of the parties, but when the amount is not fixed by contract, the law implies that the carrier shall have a reasonable reward which is to be ascertained by the amount commonly or customarily paid for other like services.<sup>1</sup> The question of the payment of freight is not affected by the "law of the flag" under which the vessel sails. The obligation of the shipper is to be determined by the law of the place where the contract of affreightment was made.<sup>2</sup>

The word "freight" is the hire agreed upon for the carriage of goods from one port to another. That hire, without a different stipulation by the parties, is only payable when the merchandise is in readiness to be delivered to the person having the right to receive it. Then the freight must be paid before an actual delivery can be called for.<sup>3</sup> Expenses of surveying a cargo dam-

<sup>1</sup> *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731; *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 352; *London & N. W. R. Co. v. Evershed*, L. R. 3 App. Cas. 1029.

<sup>2</sup> *China M. Ins. Co. v. Force*, 142 N. Y. 90.

<sup>3</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527-538, 16 L. ed. 177-181.

aged by the shipping of seas may be recovered in addition to freight, where no person exhibiting authority was present at the port of entry to act as agent of the charterers or consignee.<sup>1</sup>

Unless there be evidence to the contrary; the person receiving the cargo from a vessel under a bill of lading, is liable for the freight.<sup>2</sup> The law does not absolutely depend on any covenant to pay on delivery; it exists if it does not appear that the delivery is to precede payment.<sup>3</sup> Unless there is an express contract, the carrier is entitled only to what the carriage is worth.<sup>4</sup> And in the absence of a statement of weight in the bill of lading the ship is entitled to the freight only on the weight delivered.<sup>5</sup> Where a charter party contains no provision for payment of freight *pro rata itineris*, but simply provides for payment on delivery of the cargo at the port of discharge, freight is not earned except by performance of the voyage and delivery as specified.<sup>6</sup> If there is no express promise or condition for payment of freight in a bill of lading, it is taken as evidence of property received to be forwarded to the consignee.<sup>7</sup> Under an ordinary bill of lading, the assignee of a bill of lading is bound to pay the freight as a condition of receiving the goods.<sup>8</sup> The owner of goods can maintain no action against the carrier for refusal to deliver them before payment or tender of the freight.<sup>9</sup> In the absence of any stipulations, freight is payable only when the merchandise is in readiness to be delivered to the person having the right to receive it.<sup>10</sup>

<sup>1</sup> *The Adella S. Hills*, 47 Fed. Rep. 76.

<sup>2</sup> *Philadelphia & R. R. Co. v. Barnard*, 3 Ben. 39.

<sup>3</sup> *The Volunteer*, 1 Sumn. 551; *Gracie v. Palmer*, 21 U. S. 8 Wheat. 605, 5 L. ed. 696; *Saville v. Campion*, 2 Barn. & Ald. 503; *Christie v. Lewis*, 2 Brod. & B. 410; *Tate v. Meek*, 8 Taunt. 280.

<sup>4</sup> *Simmes v. Marine Ins. Co.* 2 Cranch, C. C. 618.

<sup>5</sup> *Nine Thousand Six Hundred and Eighty-One Dry Ox Hides*, 6 Ben. 200; *The Andover*, 3 Blatchf. 303.

<sup>6</sup> *China M. Ins. Co. v. Force*, 142 N. Y. 90.

<sup>7</sup> *Perkins v. Hill*, 2 Woodb. & M. 158, 1 Sprague, 123.

<sup>8</sup> *Trask v. Duvall*, 4 Wash. C. C. 181, distinguishing *Cock v. Taylor*, 13 East, 399.

<sup>9</sup> *Henderson v. Three Hundred Tons of Iron Ore*, 38 Fed. Rep. 36.

<sup>10</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177; *Weston v. Minot*, 3 Woodb. & M. 442; *Penoyer v. Hallett*, 15 Johns. 332.

A ship owner who is prevented from performing the voyage by a wrongful act of the charterer is *prima facie* entitled to the freight that he would have earned, less what it would have cost him to earn it.<sup>1</sup> A steamship company is not liable under a bill of lading which exempts it from liability for loss or damage by fire while goods are in transit or on deposit, to another carrier for transportation charges upon merchandise delivered by the latter upon its dock for shipment and there destroyed by fire, in the absence of proof of any contract or custom of payment of such charges before the goods are loaded upon its vessel.<sup>2</sup> The consignee of a ship has no right to demand the freight upon the whole shipment, when he is only ready to deliver a part of it. Where the master of a vessel agreed to carry 707 bales of cotton from Mobile to Boston, for certain freight mentioned in the bills of lading, the vessel was bound for safe shipment of the whole of the 707 bales, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master.<sup>3</sup> Where a ship-master has a larger shipment under one bill of lading than he can land in a day, he must do it in such quantities that he may be able to have the *pro rata* freight ascertained; and until it shall be done, he is not in readiness to deliver such part or to demand the freight due upon it. Goods so landed will be under his care and responsibility without additional expense to the consignee of them, until they shall be ready for delivery.<sup>4</sup>

The carrier may require the payment of his freight before beginning transportation. While he must carry for all alike, he may credit whom he pleases and exact payment in advance at his pleasure.<sup>5</sup> But the right of a common carrier to prepayment is waived by the acceptance of goods for transportation without such prepayment, as it is the usual custom to receive and collect freight upon delivery to the consignee.<sup>6</sup>

<sup>1</sup> *Meissner v. Brun*, 128 U. S. 474, 32 L. ed. 496; *Kleine v. Catara*, 2 Gall. 61; *Ashburner v. Balchen*, 7 N. Y. 262; *Smith v. McGuire*, 27 L. J. Exch. 496.

<sup>2</sup> *New York, L. E. & W. R. Co. v. National S. S. Co.* 37 N. Y. S. R. 731.

<sup>3</sup> *Bulkley v. Naumkeag Co.*, 65 U. S. 386-394, 16 L. ed. 599.

<sup>4</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177.

<sup>5</sup> *Pickford v. Grand Junction R. Co.* 8 Mees. & W. 372; *Central & M. R. Co. v. Morris*, 68 Tex. 49.

<sup>6</sup> *Evansville & T. H. R. Co. v. Keith* (Ind. App.) Nov. 7, 1893.

### § 127. *Contract Rates on Freight.*

An Act of Congress passed for the purpose of impairing the obligation of a contract would be void; but if the primary object of the Act is within any of its granted powers it is valid.<sup>1</sup> Contracts concerning interstate transportation must be regarded as made upon the basis and with the understanding that changes in the law applicable to them may be made by Congress, and there is no vested right in the law as it exists at the time they are made.<sup>2</sup> No right of action can spring out of an illegal contract; and this rule applies, not only when the contract is expressly illegal, but whenever it is opposed to public policy.<sup>3</sup>

Neither the Act to Regulate Commerce, nor the Act of June 15, 1866 (U. S. Rev. Stat. § 5258) was ever intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law. The observance of good faith between parties, the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the states, which the Act of June 15, 1866, aimed to promote. The Act of Congress to Regulate Commerce was approved February 4, 1887, but the provisions took effect sixty days thereafter. Contracts not excepted from the operation of this law became invalid under the second section, which is as follows: "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered in the transportation of

<sup>1</sup> *Evans v. Eaton*, 16 U. S. 3 Wheat. 454, 4 L. ed. 433, 20 U. S. 7 Wheat. 356, 5 L. ed. 472, 1 Pet. C. C. 322; *Knox v. Lee*, 79 U. S. 12 Wall. 457, 20 L. ed. 287; *George v. Concord*, 45 N. H. 434; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Shellenberger v. Brinton*, 52 Pa. 9.

<sup>2</sup> *Fitzgerald v. Grand Trunk R. Co.* 3 Inters. Com. Rep. 633, 13 L. R. A. 70, 63 Vt. 169.

<sup>3</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

passengers or property subject to the provisions of this Act than it charges, demands, collects or receives from any other person or persons for doing him or them a like or contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Mr. Cooley, the learned chairman of the Interstate Commerce Commission, delivering an opinion, said: "But the Act to Regulate Commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with state laws, as well as with Federal. There probably was never an act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render their literal enforcement impossible. The same may be said of the Federal revenue laws. Nothing is more likely than that a considerable change in customs regulations or customs duties, or in the provisions made for enforcement of excise laws, will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable." The order of the Interstate Commerce Commission in this case was reversed by the United States Circuit Court for the District of Kentucky, upon grounds which, however, do not conflict with these views.<sup>1</sup>

Mr. Justice Jackson, in discussing the power of Congress over the subject, says: "No court has attempted to define the extent, limit or scope of the power conferred by the Constitution upon Congress to regulate commerce among the states. The power is undoubtedly sovereign and exclusive. Prior to the passage of

<sup>1</sup> *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. Rep. 567.

the Interstate Commerce Act, this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters and the transportation of livestock by railroads—through the judicial department of the general government in the way of restraining or annulling state legislation or action which undertook to interfere with, obstruct or impose burdens or restrictions upon interstate commerce.” After citing the leading case of *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23, he concludes: “Possessing such sovereign and exclusive power over the subject of commerce among the states, it is difficult to understand why Congress may not legislate in respect thereto to the same extent, both as to rates and all other matters of regulation, as the states may in respect to purely local or internal commerce.” Chief Justice Marshall, in *Gibbons v. Ogden*, says: “We are now arrived at the inquiry, What is this power? It is the power to regulate: that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.”

The doctrine of *Gibbons v. Ogden*, *supra*, has been reiterated in many cases, and the Act of Congress relating to the matter under consideration is in accord with the authorities and the Constitution.<sup>1</sup> It is not necessary to determine whether Congress

<sup>1</sup> *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Morgan's Louisiana & T. R. & S. S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1



can pass a law which impairs the obligation of a contract, but it is a sound proposition that its power to legislate on this matter is at the least equal to that possessed by the legislatures of the states. The rules which have been applied to local legislation of this nature should be safe guides to follow in the adjustment of this contention.

Existing contracts for special freight rates or rebates from regular tariff rates, which had been made with railroad companies subject to the Interstate Commerce Act, became illegal when that Act took effect, and were after that time incapable of enforcement. But a contract with a carrier for rates less than those on its schedule and which is therefore unlawful as to the carrier because in violation of the Interstate Commerce Law, may nevertheless be enforced by the shipper if he had no knowledge that the schedule rate was higher than that given him.<sup>2</sup> Contracts and arrangements, producing unjust discrimination among shippers upon interstate railways, existing at the time of the enactment of the Interstate Commerce Act, are invalid.<sup>3</sup> A contract binding a carrier to transport as many carloads of grain as the shipper may desire transported is valid as to acts done in performance of it, and until revoked.<sup>4</sup>

It is within the power of the board of directors of a railway corporation to make binding contracts for rates of carriage of freights during a specified future time.<sup>5</sup> While the carrier cannot increase rates of freight so as to affect existing contracts, it may charge so as to operate on future contracts.<sup>6</sup> The limit fixed by charter for freight rates, only applies to the road constructed under the charter, and a road owned and operated by the com-

Inters. Com. Rep. 45; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

<sup>1</sup> *Bullard v. Northern Pac. R. Co.* 3 Inters. Com. Rep. 576, 11 L. R. A. 246, 10 Mont. 168.

<sup>2</sup> *Mobile & O. R. Co. v. Dismukes*, 4 Inters. Com. Rep. 200, 17 L. R. A. 113, 94 Ala. 131.

<sup>3</sup> *Southern Wire Co. v. St. Louis Bridge & T. R. Co.* 38 Mo. App. 191.

<sup>4</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

<sup>5</sup> *C. — & M. R. Co. v. Hinrod Furnace Co.* 37 Ohio St. 434.

<sup>6</sup> *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

pany outside of the limits of the state which controls the charter, is not controlled by the provision.<sup>1</sup> Where, under a statute authorizing the purchase, one railway acquires possession of another, the limitations fixed by law upon the road sold retain their operative force.<sup>2</sup> Mere brokers employed by the charterer's agents to sell a cargo are not liable for the freight to the master of the vessel.<sup>3</sup> A shipper of grain has a right to rely upon the representations of a station agent as to rates, and the railroad company is bound thereby.<sup>4</sup> Upon tender by the charterer's agent of the balance due under the charter, the master of a vessel should surrender the bills of lading and authorize the agents to collect the freight thereon.<sup>5</sup>

An application by the shipper to the local freight agent, for the rates upon the proposed shipment of a specified amount of freight to a given point, and the fixing of the rate and the securing by the shipper of the requisite number of cars per week for the purpose of making such shipment, amounts to a contract to furnish the cars and make such shipments at the rates named.<sup>6</sup> A carrier whose waybill clerk, having misunderstood the name of a station, the rate to which was asked by a shipper, and who upon discovering the mistake was unable to find the shipper, but forwarded the freight, is entitled to hold the goods at their destination until payment by the shipper, upon prompt and due notice of the difference between the regular rate and the rate he paid, as in such case there is no meeting of minds so as to constitute a contract of shipment.<sup>7</sup>

No order of court is necessary to authorize the making of a contract by a freight agent with reference to freight rates, where the railroad passes into the hands of receivers.<sup>8</sup> It cannot be as-

<sup>1</sup> *Knight v. Southern Pac. R. Co.* 41 Tex. 406.

<sup>2</sup> *Campbell v. Marietta & C. R. Co.* 23 Ohio St. 168; *Moline & M. R. Co. v. Steiner*, 61 Ala. 559; *State v. Moline & M. R. Co.* 59 Ala. 321.

<sup>3</sup> *Dumora v. Craig*, 48 Fed. Rep. 736.

<sup>4</sup> *Ohio & M. R. Co. v. Savage*, 38 Ill. App. 143.

<sup>5</sup> *Dumora v. Craig*, *supra*.

<sup>6</sup> *Toledo, W. & W. R. Co. v. Roberts*, 71 Ill. 540.

<sup>7</sup> *Rowland v. New York, N. H. & H. R. Co.* 61 Conn. 103, 49 Am. & Eng. R. Cas. 61.

<sup>8</sup> *Kansas Pac. R. Co. v. Bayles*, 19 Colo. 348.

sumed that a receiver operating a railroad had no power to make a contract for rebate to a shipper, where his lack of authority is not shown.<sup>1</sup> The master of a vessel having agreed, for a stipulated price, to transport goods, no time of delivery being specified, is entitled, where the close of navigation interrupts his voyage, to hold the goods until the opening of navigation,<sup>2</sup> and may recover full freight, where the consignee forcibly takes the goods from him when he is able and willing to complete the transportation.<sup>3</sup> A construction by the railroad commissioners, of the term "carload," in a statute fixing the maximum freight rates at so much per carload for each of the several classes of freight, as meaning, in the light of existing usage, ten tons, and not all that a car can safely carry, is reasonable and just and will be followed by the courts where it has been acted upon long enough to become a rule.<sup>4</sup> The fact that under state regulations the shipper may load a car at discretion, to any extent, without affecting the carload rate, is no reason for adopting a like rule in traffic, if that course is found not to be most just and politic. The substitution by carriers of livestock, of a rule fixing carload rates, but prescribing a minimum weight for a carload, charging by the hundred pounds in proportion to the carload rate for excess over the minimum, in place of a rule leaving the shipper to load into the car as much livestock as he pleased,—is not unlawful.<sup>5</sup>

Where the contract stated "the rates on iron from Rising Fawn to Chattanooga shall be \$6 to Chattanooga, and \$5 to any point on or beyond the Nashville, C. & St. L. Railroad, per carload of 2268 lbs.," it should be construed as fixing the rate at \$6 per carload when shipped from Rising Fawn only to Chattanooga,—and

<sup>1</sup> *Bayles v. Kansas Pac. R. Co.* 2 Inters. Com. Rep. 643, 5 L. R. A. 480, 13 Colo. 181.

<sup>2</sup> *The Nathaniel Hooper*, 3 Sumn. 542; *Saltus v. Ocean Ins. Co.* 12 Johns. 107, 7 Am. Dec. 290; *Allen v. Mercantile Mut. Ins. Co.* 44 N. Y. 437, 4 Am. Rep. 700.

<sup>3</sup> *Braithwaite v. Power*, 1 N. D. 455; *Luke v. Syde*, 2 Burr. 882; *Hughes v. Sun Mut. Ins. Co.* 100 N. Y. 58; *Meissner v. Brun*, 128 U. S. 474, 32 L. ed. 496.

<sup>4</sup> *Ross v. Kansas City, St. J. & C. B. R. Co.* 111 Mo. 18, 49 Am. & Eng. R. Cas. 499.

<sup>5</sup> *Leonard v. Chicago & A. R. Co.* 2 Inters. Com. Rep. 599.

\$5 when shipped to any point beyond Chattanooga; the low rate should not apply to iron shipped at Chattanooga.<sup>1</sup> No deduction from the freight can be made for the expense of piling a cargo of laths, on which the consignee refuses to pay the freight, but receives in his carts and piles them about 300 feet from the vessel, where by the bill of lading the master is bound to unload the cargo, unless the consignee elects to do it, for 20 cents per thousand, but not to pile the laths.<sup>2</sup> Freight is not collectible upon packages not delivered, unless the contract expresses a different intent with reasonable certainty. On a bill of lading for consignments of cocoanut oil in casks, stipulating for freight at a certain rate per ton, "to be paid on right delivery," no freight can be charged for casks lost by sea perils. But where an allowance for freight on portions of a cargo that was lost has been made to the owner in general average adjustment, he may be compelled to pay the freight so allowed him to the shipper.<sup>3</sup> Shippers of cattle who sign a general contract stipulating that freight is payable thereon on the number shipped, whether delivered alive or not delivered at all, and is payable in Liverpool on the arrival of the vessel, and that the freight shall be paid by the consignees, are, upon the loss of the vessel and cattle before arrival, liable for the full amount of freight.<sup>4</sup>

Under a charter party for the full capacity of a vessel, providing that the freight shall be paid on the unloading and right delivery of the cargo, at a certain rate per ton on intake weight, in which the printed word "delivered" has been stricken out, and the words "on intake weight" inserted, freight is payable on the whole cargo, although a portion of it is lost in transit upon delivery of the undamaged portion.<sup>5</sup> Where the charter party entitles the ship to her whole freight "upon the true delivery" of the whole cargo, and a part of the cargo is delivered in a damaged condition, the ship is entitled to the whole freight less the damages

<sup>1</sup> *Alabama G. S. R. Co. v. Cureton*, 68 Ga. 824.

<sup>2</sup> *Costello v. 734,700 Laths*, 44 Fed. Rep. 105.

<sup>3</sup> *Gibson v. Brown*, 44 Fed. Rep. 98.

<sup>4</sup> *The Queensmore*, 53 Fed. Rep. 1022, affirming 51 Fed. Rep. 250.

<sup>5</sup> *One Thousand Bags of Sugar v. Harrison*, 53 Fed. Rep. 828.

for the loss on the cargo.<sup>1</sup> Under a charter party providing that freight shall be paid on right delivery of cargo if discharged in the United Kingdom, in cash as customary, and if on the Continent, in cash at the exchange of the day of final discharge without discount, the ship is not entitled to freight upon a portion of the cargo condemned on survey and sold in a port of distress before reaching the port of discharge.<sup>2</sup>

A clause of a charter party providing that cash for steamer's ordinary disbursements at port or ports of lading, not exceeding a specified sum, shall be advanced at a specified exchange on account of freight, is optional, and not obligatory on the owners of the vessel, so that if they provide their master with money to disburse the ship, he is not bound to apply to the charterers for cash up to the amount limited, by way of advance freight, so as to entitle the latter to recover the profits which they would have made by difference of exchange on such sum if they had advanced it.<sup>3</sup> Under a charter party calling for "one third freight, if required to be advanced," a requirement of the advance made within the usual time is not too late, although the vessel has already been wrecked and the cargo lost.<sup>4</sup>

The owner's of a vessel chartered by a charter party, having collected the entire freight from the consignee, are liable to the inland carrier who delivered the goods to the owner's vessel, for the freight money due such inland carrier. They are not entitled to retain the entire freight money, both sea and inland, for satisfaction of their lien and claim for charter money.<sup>5</sup> Loss of cargo by the sinking of a vessel after the commencement of the voyage and before bills of lading are signed, under a charter party providing that one third the freight is to be paid on signing bills of lading and the remainder on unloading, and that bills of lading shall be signed within twenty-four hours after the cargo is on board, does not relieve the charterers from their liability to present

<sup>1</sup> *The Tangier*, 32 Fed. Rep. 230.

<sup>2</sup> *The Industrie* [1894] Prob. 58.

<sup>3</sup> *The Primula* [1894] Prob. 128.

<sup>4</sup> *Smith v. Pyman* [1891] 1 Q. B. 742, reversing [1891] 1 Q. B. 42.

<sup>5</sup> *Fargo v. Milburn*, 100 N. Y. 94.

bills of lading for signature, and upon their refusal so to do the ship owner is entitled to recover damages equal to the amount of the advance freight.<sup>1</sup>

Under a bill of lading for the delivery on the payment of "freight and charges," where the carrier pays for the recovery of the sunken cargo, the salvage paid is a charge for which the carrier holds a lien upon the recovered property.<sup>2</sup>

Where the freight was to be paid on delivery of the goods at the place to which they were shipped, and the carrier was released by a stipulation from claims for loss by fire, no freight can be recovered where the property is destroyed by fire *in transitu*.<sup>3</sup> The shipper has the right to change the address upon or to claim the delivery of his goods at any point before they reach their destination, where the goods are shipped subject to his order, or he has retained property in them, and holds the bill of lading, if the goods are in such a situation that they can be reached by the carrier and delivered without special inconvenience, but if there has been no delay in the transportation the carrier is entitled to claim freight for the full distance for which they were accepted.<sup>4</sup> An order to a carrier by a shipper to pay to a third person all rebates due, and to become due, on freight charges on goods "shipped" by its route, is improperly construed to cover shipments made after the date of the order.<sup>5</sup>

### § 128. *Carrier's Lien for Charges.*

The carrier is entitled to his lien although he does not charge directly for the carriage and he will be liable for a loss occurring though its carriage is only paid for in indirect benefit to the carrier. Thus, an agreement to return the sacks free, in which the carrier has transported grain to market, will render the carrier responsible as carrier for the loss of the sacks.<sup>6</sup> The lien

<sup>1</sup> *Oriental SS. Co. v. Tylor* [1893] 2 Q. B. 518.

<sup>2</sup> *Chicago & S. W. R. Co. v. Northwestern U. Packet Co.* 38 Iowa, 377.

<sup>3</sup> *New York Cent. & H. R. R. Co. v. Standard Oil Co.* 87 N. Y. 486.

<sup>4</sup> *Scothorn v. South Staffordshire R. Co.* 8 Exch. 341.

<sup>5</sup> *Chicago & N. W. R. Co. v. Becker*, 33 Ill. App. 290.

<sup>6</sup> *Pierce v. Milwaukee & St. P. R. Co.* 23 U. S. 387; *Aldridge v. Great Western R. Co.* 15 C. B. N. S. 582.

of a carrier and warehouseman for the keeping of property after a completion of the transportation thereof is superior to that of a pledgee who procured the property to be transported and stored by it.<sup>1</sup> A statutory provision affording an adequate remedy at law to enforce a carrier's lien by providing for a sale of freight to pay the charges thereon does not take away any previously existing equitable remedy, in the absence of an express provision to that effect.<sup>2</sup> The master is bound to deliver the goods in a reasonable time. When the shipment can not be landed in a day, if he lands a part of it, his lien upon the whole gives him the power to ask from the consignee security for the payment of the entire freight as called for by the bill of lading. But, a security or arrangement is all that he can ask. He can not demand that the freight of the whole shipment should be paid before the consignee has the opportunity to examine the goods. When landings of the same shipment are made on different days, if the shipper shall not be present to receive the goods and has not made an arrangement to secure the payment of the freight, they may be stored for safe keeping at the consignee's expense and risk, in the shipowner's name, to preserve his lien for the freight.<sup>3</sup> A clause in a bill of lading empowering the master to put the cargo ashore at the consignee's risk if not applied for within twenty-four hours after notice of its arrival, and giving him a lien thereon for all money payable to the shipowner, does not apply so as to relieve the consignee, who applied for the cargo within the stipulated time, from liability for default in unloading the ship, caused by a strike of the lightermen.<sup>4</sup>

A ship owner has an independent right of action against the consignee who receives the goods, for the full amount of the freight under the bill of lading, notwithstanding a deposit by the consignee under the English Merchant's Shipping Act 1862, §§ 66-72, empowering the ship owner to place the goods in the

<sup>1</sup> *Cooley v. Minnesota Transfer R. Co.* 53 Minn. 327.

<sup>2</sup> *Crass v. Memphis & C. R. Co.* 96 Ala. 447.

<sup>3</sup> *Britton v. Barnaby*, 62 U. S. 527-538, 16 L. ed. 177.

<sup>4</sup> *Hick v. Rodocanachi* (Eng. Ct. App.) 65 L. T. Rep. N. S. 300, 44 Alb. L. J. 462.

custody of a warehouse owner subject to the lien for freight, and allowing the owner of the goods to deposit money equal to the amount claimed by the ship owner, upon which the lien shall be discharged without prejudice to any other remedy the ship owner may have for the recovery of freight, and providing that, in the event of dispute as to the amount payable for freight, the ship owner shall be paid so much of the deposit as is admitted to be due, and the balance be returned to the owner of the goods, unless the ship owner takes proceedings to recover it.<sup>1</sup>

The rates which carriers are required by the sixth section of the statute to publish, file, and adhere to without deviation cover not merely the carriage, but services rendered in receiving and delivering property as well. The lien of carriers upon freight for charges earned is satisfied by the payment of rates for their services which they are lawfully entitled to demand, and a guaranty executed to a carrier by consignees or third parties, which might be construed to enable the carrier, in consideration of freight delivery before settlement of transportation charges, to exact for services rendered in moving and delivering the freight whatever it chooses to demand, cannot be used by the carrier to force payment of charges in excess of those it would be entitled to collect or receive if previous freight delivery had not been made. The Interstate Commerce Act does not recognize indefinite or uncertain transportation charges, the idea of unequal compensation for like service, or discrimination in the treatment of persons similarly situated, is repugnant to every requirement of that law, and a party to an interstate shipment cannot be excluded by the carrier from privileges afforded to other patrons in the same locality because of his refusal to pay excessive freight charges, even though an agreement to subsequently refund the excess should accompany the demand. But when actual weights of cotton shipments cannot be ascertained without great inconvenience to the shipper or carrier, and when transportation charges are promptly adjusted by the carrier upon the basis of actual weights furnished by the consignee, a practice of billing the cot-

<sup>1</sup> *Furness v. White* [1894] 1 Q. B. 483.



ton at a proper estimated weight per bale should not be deemed unlawful.<sup>1</sup>

A carrier acquires no right by virtue of his employment as such to hold goods delivered to him by a wrongdoer, to whom they do not belong, until his charges are paid, against the claim of the owner, and therefore has no lien upon them.<sup>2</sup> The universal and fundamental principle of the law of personal property is that no man can be divested of his property without his own consent; and that even an honest purchaser under a defective title cannot hold against the true proprietor. The only exception to this rule in ancient English jurisprudence was that of sales in markets overt; but in this country the law of markets overt has not been adopted.<sup>3</sup> If a carrier gets property from a person not authorized to direct its shipment, it has no lien for its services, and no right to retain the property.<sup>4</sup> A carrier which receives goods from another carrier, with the knowledge that the shipper has directed shipment by the first carrier over a different connecting route, has no carrier's lien upon the goods, either for its own charges or for charges advanced to the first carrier; and proof of a contract between the two carriers to systematically disregard shipping directions obviates the necessity of specific proof of different shipping directions in the case in suit.<sup>5</sup>

The rule that, to entitle the consignee to the possession of the goods, he must pay or tender to the carrier the legal charges for their carriage, has no application in an action against the carrier for the conversion of the goods.<sup>6</sup> The declaration of the court in the above case that the general rule requiring payment of legal

<sup>1</sup> *Phelps v. Texas & P. R. Co.* 4 Inters. Com. Rep. 363.

<sup>2</sup> *Van Buskirk v. Purinton*, 2 Hall, 561; *Collman v. Collins*, 2 Hall, 569; *Stevens v. Boston & W. R. Corp.* 8 Gray, 262; *Clark v. Lowell & L. R. Co.* 9 Gray, 231; *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13; *Travis v. Thompson*, 37 Barb. 236.

<sup>3</sup> 2 Kent, Com. 324; *Dame v. Baldwin*, 8 Mass. 518; *Wheelwright v. Depeyster*, 1 Johns. 480; *Hosack v. Weaver*, 1 Yeates, 478; *Easton v. Worthington*, 5 Serg. & R. 130; *Browning v. Magill*, 2 Har. & J. 308; *McGrew v. Browder*, 2 Mart. N. S. 17; *Roland v. Gundy*, 5 Ohio, 202; *Lance v. Cowan*, 1 Dana, 195; *Ventress v. Smith*, 35 U. S. 10 Pet. 161, 9 L. ed. 382; *Hoffman v. Carow*, 22 Wend. 285; *Saltus v. Everett*, 20 Wend. 276, 32 Am. Dec. 541.

<sup>4</sup> *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143.

<sup>5</sup> *Hill v. Denver & R. G. R. Co.* 4 L. R. A. 376, 13 Colo. 35.

<sup>6</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489.

charges for the transportation of goods before the consignee is entitled to their possession has no application in an action for their conversion, is made without discussion or citation of authorities. In this case it appears that the goods were beyond the power of the carrier to deliver. In harmony with this doctrine is the decision in *Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541, that no tender of freight is necessary before bringing an action where a carrier has actually converted the goods by selling them. The same doctrine is implied in decisions that damages for a carrier's conversion of goods by selling them for freight should be diminished by subtracting the amount of the freight charges.<sup>1</sup> But where an action of trover is brought for goods which the carrier refuses to deliver without payment of freight and for which the plaintiff refuses to pay freight because the goods have been damaged, it is held in *Miami Powder Co. v. Port Royal & W. C. R. Co.* 38 S. C. 78, that the action can be maintained without payment of the freight, if at all, only where the damages equal or exceed the amount of the freight. The court makes some question whether in any such case an action for the conversion of damaged goods which the carrier is ready to deliver on payment of the freight can be brought without first paying the freight. The case of *Ewart v. Kerr*, 2 McMull. L. 141, affirming the same point in *Rice*, L. 203, held that an action of trover would lie without first paying freight on damaged goods which were detained under the carrier's lien where the injury to the goods exceeded the freight.

A railroad company receiving horses from a connecting line, with notice that the shipper has attempted to prepay the freight for the whole transportation, but has not paid it in full at the regular rates, and also that he contemplates a continuous and speedy passage, has the right to carry the horses through to their destination, and claim a lien on them for the balance of the freight. An unforeseen case had arisen, and the receiving railroad was called on by the plaintiff's agent to act, in some way.<sup>2</sup> The ship-

<sup>1</sup> *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626; *Cottingham v. Grand Trunk R. Co.* 7 Mont. L. Rep. (Sup. Ct.) 385.

<sup>2</sup> *Potts v. New York & N. E. R. Co.* 131 Mass. 455, 41 Am. Rep. 247.

per was not present and it might take time and cost money to communicate with him.

The subsequent cases referred to by the court in *Miami Powder Co. v. Port Royal & W. C. R. Co.* 38 S. C. 78, as throwing doubt upon the decision in *Ewart v. Kerr*, *supra*, do not seem to be inconsistent with that case as no claim of a lien on the goods is involved, but in each of these cases the carrier offered to deliver the goods, and the owner refused to accept them without payment of the damage which had been done to them. The cases in this country seem to be uniform in holding that no payment or tender of freight charges by the rightful owner of the goods is necessary to give him a right of action against the carrier where the latter refuses to deliver them without such payment, if they were delivered to the carrier by one who had stolen or otherwise wrongfully obtained possession of the goods, and who had no authority from the owner to put them in the carrier's custody.<sup>1</sup>

These are not all cases of trover but the doctrine established by them is clearly applicable in trover. The contrary doctrine is recited in *Yorke v. Grenough*, 2 Ld. Raym. 867, in which a decision in the case of the Exeter carrier, which does not seem to have been otherwise reported, is referred to as holding that a carrier could hold for his charges even as against the true owner goods which had been stolen from him and placed without right in the carrier's custody. Where a carrier claims payment in addition to freight as a condition of surrendering the goods no tender or payment of the freight is necessary before bringing an action of trover.<sup>2</sup> The cases of *Van Buskirk v. Purington*, 2 Hall, 561, and *Collman v. Collins*, 2 Hall, 569, have been cited on the question of a carrier's right to hold under his lien goods delivered to the carrier without right. But those cases are hardly in point. The goods in those cases had been placed on a ship by a person who had bought them under a conditional sale, and had not

<sup>1</sup> *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Stevens v. Boston & W. R. Corp.* 8 Gray, 266; *Clark v. Lowell & L. R. Co.* 9 Gray, 231; *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13.

<sup>2</sup> *Isam v. Greenham*, 1 Handy (Ohio) 357; *Adams v. Clark*, 9 Cush. 215, 57 Am. Dec. 41.

obtained title by paying for them, and it was held that they could not be retained under a lien given by a charter party, but there had been no transportation of the goods, and the owner offered to pay for the lading and unlading. But the cases so far as they go are in harmony with the other American cases which deny a carrier's lien as against a true owner for goods obtained from a thief or wrongdoer. Where the attempt was to prepay the entire freight, the horses were perishable, and their keep would probably have cost more than their unpaid freight if they had been delayed. If the delivering road had a contract with the shipper it could be made to indemnify the shipper in the place where the contract was made. Under such circumstances, there can be no doubt what course was most for the advantage of the owner, or what directions a prudent owner, if present, would give; and the analogies of the law would imply a corresponding authority in the defendant.<sup>1</sup> If the effect of the plaintiff's instructions were doubtful, the law would give the defendant the benefit of the interpretation adopted by it in good faith,<sup>2</sup> and would consider the question of an immediate decision.<sup>3</sup> But the shipper knew that the receiving road was not bound by his contract of shipment, and therefore knew that a higher rate might be demanded, beyond the line of the road to which he had made the delivery, than had been paid. And the receiving road was justified in giving preponderance to the requirement of continuous and speedy carriage and in assuming that the authority of the railroad which offered the horses was not conditional upon the payment of freight, by the shipper, turning out to be full payment of all that the defendant could demand.<sup>4</sup>

It is to be observed that the principle that no man's property can be taken from him without his consent, express or implied, has not prevented the last of a line of carriers from maintaining its lien when the first carrier has forwarded the goods to a wrong

<sup>1</sup> *Knight v. Providence & W. R. Co.* 13 R. I. 572, 43 Am. Rep. 46; *Pierce v. Columbian Ins. Co.* 14 Allen, 320.

<sup>2</sup> *Ireland v. Livingstone*, L. R. 5 H. L. 395.

<sup>3</sup> *Hawks v. Locke*, 139 Mass. 205, 52 Am. Rep. 702.

<sup>4</sup> See *Wolf v. Hough*, 22 Kan. 659; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Vaughan v. Providence & W. R. Co.* 13 R. I. 578-581; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56, *et seq.*

place.<sup>1</sup> Yet in that case the last carrier may be said to have had notice that the forwarding agent's authority was limited to sending the goods to the place directed by the shipper.<sup>2</sup> The master of a vessel having a lien for freight is authorized to refuse delivery of cargo until the freight is paid or secured.<sup>3</sup> A pledgee of a vessel and freight which is wrecked before the destination is reached is not entitled to a lien upon the cargo for proportional freight, where the charter party provided for the payment of freight upon delivery of cargo at port of discharge.<sup>4</sup> A lien for freight is not waived by delivery of the cargo, where the master demands the freight before the unloading is completed, and stops the delivery upon its nonpayment, and makes special delivery of the remainder subject to the lien.<sup>5</sup>

The lien for freight on a cargo of laths is not abandoned by permitting the consignee, who refuses to pay the freight, to take them from the vessel in his carts and cart them about 300 feet and pile them, where they were piled as he claims, for the benefit of the vessel.<sup>6</sup> But an unconditional delivery of the entire cargo of a canal boat to the purchaser of the cargo from the consignee, without any notice to such purchaser of any lien or claim for freight or demurrage destroys the lien.<sup>7</sup> Parties may, however, agree that goods shall be deposited in the warehouse of the consignee or owner and that their transfer and deposit shall not be regarded as a waiver of the lien.<sup>8</sup> A common carrier waives his right to detain goods for the freight, if he puts his refusal to deliver them to the owner upon the ground that they are not in his possession at the place where a demand is duly made.<sup>9</sup> If the

<sup>1</sup> *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626, distinguishing *Robinson v. Baker*, 5 Cush. 137, 51 Am. Dec. 54; *Whitney v. Beckford*, 105 Mass. 267; *Patten v. Union Pac. R. Co.* 29 Fed. Rep. 590, disapproving *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Vaughan v. Providence & W. R. Co.* *supra*.

<sup>2</sup> *Crossan v. New York & N. E. R. Co.* 3 L. R. A. 766, 149 Mass. 196.

<sup>3</sup> *The Ira B. Ellems*, 48 Fed. Rep. 591.

<sup>4</sup> *China Mut. Ins. Co. v. Force*, 142 N. Y. 90.

<sup>5</sup> *Cuff v. 95 Tons of Coal*, 46 Fed. Rep. 670.

<sup>6</sup> *Costello v. 734,700 Laths*, 44 Fed. Rep. 105.

<sup>7</sup> *Egan v. Cargo of Spruce Laths*, 43 Fed. Rep. 480.

<sup>8</sup> *Mordecai v. Lindsay* ("The Eddy"), 72 U. S. 5 Wall. 481, 18 L. ed. 486.

<sup>9</sup> *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73.

failure to deliver the goods, on demand of the consignee, is not placed upon the ground of a lien for charges, or the nonpayment thereof, the carrier cannot set up such lien or nonpayment in defense of a subsequent action for the loss of the goods.<sup>1</sup> A carrier cannot hold goods to which the title has passed upon delivery to the carrier, subject to a lien for prior freights due from the consignor on other consignments.<sup>2</sup>

Where a consignee of a safe in a carrier's warehouse, placing his hand upon it, said to the carrier's agent, "I place this safe in your hands as security for what I owe," the carrier already having a lien upon it for the freight on that as well as on other goods; and the agent made no response, even if it is conceded that his silence constituted an acceptance of the offer,—the transaction does not amount to such a delivery of the goods as will defeat the right of stoppage *in transitu*. A stipulation in a bill of lading, that the carrier shall have a lien upon the goods shipped for all arrearages of freight and charges due by the consignees on other goods, is subordinate to the right of stoppage *in transitu*.<sup>3</sup> A carrier, having elected to detain bees to enforce its lien for freight, is bound to take all reasonable measures to prevent injury to them while so detained; and its failure to unload the bees within a reasonable time is negligence making it liable for the damages caused thereby.<sup>4</sup>

A railroad company receiving freight from a connecting road is under no obligation to advance to the latter the charges due the latter for transportation, although if it does so it has a lien for payment on the goods.<sup>5</sup> A railway company has a lien on freight for its own charges and those of former carriers paid or advanced by it, though such charges exceed the rate guaranteed in the bill of lading made by another company, and not authorized or adopted by it. The Arkansas act of Feb. 27, 1885, requiring the surrender of freight on the payment of the charges speci-

<sup>1</sup> *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

<sup>2</sup> *Bacharach v. Chester Freight Line*, 133 Pa. 414.

<sup>3</sup> *Farrell v. Richmond & D. R. Co.* 3 L. R. A. 647, 102 N. C. 390.

<sup>4</sup> *St. Louis, A. & T. H. R. Co. v. Flannagan*, 23 Ill. App. 489.

<sup>5</sup> *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. Rep. 465.

fied in the bill of lading, applies only to bills of lading by which the company is bound as having made, authorized, or adopted them, especially where the excess is due to misrouting by one of the other carriers.<sup>1</sup>

A clause of a charter party, that the liabilities of the charterers shall cease on the vessel being loaded, the master and owners having a lien on the cargo for all freight and demurrage, relieves the charterers only from liability to the extent to which the ship owner obtains a lien for the freight upon the cargo; and the charterers are liable for a difference between the amount due for lump freight under the charter party and that for which the ship owner has a lien, where by reason of a diminution in weight of the cargo during the voyage the amount of the bill of lading freight does not wholly cover the amount due for lump freight.<sup>2</sup> The fact that the whole amount demanded in a libel for unpaid freight and for charges on the cargo is sufficient to give jurisdiction on appeal to the United States Supreme Court will not prevent splitting the claims by a decree for the amount of the freight, which is undisputed, leaving the other item in dispute, although the amount of this is not sufficient to give an appeal.<sup>3</sup>

### § 129. *Sale to Enforce Lien on From Necessity.*

As it is the duty of a carrier—on failure of the consignee to pay his charges—to store the goods subject to his lien, with some responsible warehouseman, he is authorized, after a reasonable time, to take such legal proceedings as will authorize a sale to enforce the lien.<sup>4</sup> When the goods, for the purpose of protecting the carrier's lien, are in the hands of the warehouseman, the latter holds them subject to his own lien and as the representative of the carrier.<sup>5</sup> Where the goods, however, are of a perishable

<sup>1</sup> *Fordyce v. Johnson*, 56 Ark. 430; *Loewenberg v. Arkansas & L. R. Co.* 56 Ark. 439.

<sup>2</sup> *Hansen v. Harrold* [1894] 1 Q. B. 612.

<sup>3</sup> *Larrinaga v. 2000 Bags of Sugar*, 40 Fed. Rep. 507.

<sup>4</sup> *Indianapolis & St. L. R. Co. v. Herndon*, 81 Ill. 143; *Briggs v. Boston & L. R. Co.* 5 Allen, 246, 83 Am. Dec. 626; *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 545; *Saltus v. Everett*, 20 Wend. 269, 32 Am. Dec. 541; *Rankin v. Memphis & C. Packet Co.* 9 Heisk. 564, 24 Am. Rep. 339.

<sup>5</sup> *Western Transp. Co. v. Barber*, 56 N. Y. 544.

character and the consignee will not receive them, the carrier is not only justified, but required to sell them in discharge of his lien.<sup>1</sup> The same rule applies in cases of necessity, from accident to the vessel on which they are carried—or any other cause preventing the completion of the voyage, where the forwarding of the goods is rendered impossible and exceedingly hazardous.<sup>2</sup> But, such a sale can only be made under the highest degree of necessity, there being no other possible manner of preserving the goods. Otherwise, the sale would charge the carrier with conversion.<sup>3</sup>

The possession by the carrier of goods is of such a character as to put the public upon its guard when the carrier offers the goods for sale, and a title which rests for its validity upon its unauthorized and illegal sale by the carrier,—although for full value—cannot be asserted against the owner.<sup>4</sup> If the owner may be consulted without peril to the cargo from the delay, it is an absolute duty of the carrier to do so before making a disposition of the cargo.<sup>5</sup> Where such a sale is made, the most available market must be sought by the carrier and the highest price obtainable secured.<sup>6</sup>

<sup>1</sup> *Rankin v. Memphis & C. Packet Co.* 9 Heisk. 564, 24 Am. Rep. 339.

<sup>2</sup> *Notara v. Henderson*, L. R. 5 Q. B. 346; *Freeman v. East India Co.* 5 Barn. & Ald. 617; *Cannan v. Meaburn*, 1 Bing. 243; *Pope v. Nickerson*, 3 Story, 465; *Arthur v. The Cassius*, 2 Story, 81; *The Gratitude*, 3 C. Rob. Adm. 259; *Cammell v. Sewell*, 3 Hurlst. & N. 617; *Butler v. Murray*, 30 N. Y. 88, 86 Am. Dec. 355; *Barrell v. The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406; *Vlierboon v. Chapman*, 13 Mees. & W. 230.

<sup>3</sup> *Myers v. Baymore*, 10 Pa. 114, 49 Am. Dec. 586; *Wilson v. Dickson*, 2 Barn. & Ald. 2; *Australian Steam Nav. Co. v. Morse*, L. R. 4 P. C. 222; *Ewbank v. Nutting*, 7 C. B. 797; *New England Ins. Co. v. The Sarah Ann*, 38 U. S. 13 Pet. 387, 10 L. ed. 213; *Acatos v. Burns*, L. R. 3 Exch. Div. 282; *Smith v. Martin*, 6 Binn. 262; *Atlantic Mut. M. Ins. Co. v. Huth*, L. R. 16 Ch. Div. 474; *Cannan v. Meaburn*, 1 Bing. 243; *Hall v. Ocean Ins. Co.* 37 Fed. Rep. 371.

<sup>4</sup> *Kitchell v. Vanadar*, 1 Blackf. 356, 12 Am. Dec. 249; *Lickbarrow v. Mason*, 6 East, 21; *McCombie v. Davies*, 6 East, 538; *Hunt v. Haskell*, 24 Me. 339, 41 Am. Dec. 387; *Doane v. Russell*, 3 Gray, 382; *Rankin v. Memphis & C. Packet Co.* 9 Heisk. 564, 24 Am. Rep. 339; *Powell v. Buck*, 4 Strobb. L. 427.

<sup>5</sup> *American Ins. Co. v. Centre*, 4 Wend. 45; *Astrup v. Leary*, 19 Fed. Rep. 536; *Moore v. Hill*, 38 Fed. Rep. 330; *Hall v. Franklin Ins. Co.* 9 Pick. 466; *Myers v. Baymore*, 10 Pa. 114, 49 Am. Dec. 586; *Bank of St. Thomas v. The Julia Blake*, 107 U. S. 418, 27 L. ed. 595.

<sup>6</sup> *Post v. Jones*, 60 U. S. 19 How. 150, 15 L. ed. 618.



If the voyage is broken up in the course of it, by ungovernable circumstances, the master may, in that case, even sell the ship or cargo, provided he act in good faith, for the good of all concerned, and in case of supreme necessity, which sweeps all ordinary rules before it.<sup>1</sup> The necessity is not physical but moral, amounting to strong and vehement exigency. It may be properly determined by considering whether, under like circumstances, a sale would have been made by a considerate owner, for his own interest, and that of all concerned,<sup>2</sup> as when nothing better can be done for the owner, or those concerned in the venture;<sup>3</sup> when vessel is total wreck;<sup>4</sup> and if the expense of repairs would exceed the value of the vessel when repaired.<sup>5</sup> There must be a moral necessity. The captain is an agent from necessity, and his conduct will be closely scanned.<sup>6</sup> If the master can consult the owner within a reasonable time, he is bound to do so.<sup>7</sup> So the sale by the master of such part of the vessel as belong to part owners who were not, but might have been notified by telegraph in season to act in the premises before the sale, is void.<sup>8</sup> In the sale of a stranded vessel by the master, there is no implied warranty of his right to sell, if the purchaser has every opportunity of examining her and ascertaining whether she is in such a state as to give the master authority to sell her as a wreck.<sup>9</sup> Though the master may sacrifice his cargo in order to save his ship, he

<sup>1</sup> *Cannan v. Meaburn*, 1 Bing. 243; *The Fanny & Elmira*, Edw. Adm. 117; *Read v. Bonham*, 3 Brod. & B. 147; *Scull v. Briddle*, 2 Wash. C. C. 150; *The Tilton*, 5 Mason, 476; *Hayman v. Moulton*, 5 Esp. 65; *Milles v. Fletcher*, 1 Dougl. 231; *Idle v. Royal Exch. Assur. Co.* 8 Taunt. 755; *Freeman v. East India Co.* 5 Barn. & Ald. 617; *Robertson v. Clarke*, 1 Bing. 446.

<sup>2</sup> *Robinson v. Commonwealth Ins. Co.* 3 Sumn. 220; *Pope v. Nickerson*, 3 Story, 465. See also, *American Ins. Co. v. Ogden*, 15 Wend. 532; *The Lord Cochrane*, 8 Jur. 716.

<sup>3</sup> *Fitz v. The Amelie*, 73 U. S. 6 Wall. 18, 18 L. ed. 806, 2 Cliff. 440; *Chambers v. Grantzon*, 7 Bosw. 414; *Cambridge v. Anderton*, 2 Barn. & C. 693.

<sup>4</sup> *Cambridge v. Anderton*, *supra*; *Ireland v. Thomson*, 4 C. B. 149.

<sup>5</sup> *Gordon v. Massachusetts, F. & M. Ins. Co.* 2 Pick. 249.

<sup>6</sup> *Hartman v. The Will*, 4 Pa. L. J. Rep. 350.

<sup>7</sup> *Fitz v. The Amelie*, 73 U. S. 6 Wall. 18, 18 L. ed. 806; *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782; *New England Ins. Co. v. The Sarah Ann*, 38 U. S. 13 Pet. 387, 10 L. ed. 213; *Pierce v. Ocean Ins. Co.* 18 Pick. 83.

<sup>8</sup> *Miller v. Thompson*, 60 Me. 322. See *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248.

<sup>9</sup> *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127.

cannot pass any title to a voluntary donee which can be asserted against the owner, even though it be shown that the goods would otherwise have been lost.<sup>1</sup>

### § 130. *Lien of Contract of Affreightment.*

Ship owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of goods; and the shipper, consignee or owner of the cargo contracts to pay the freight and charges; and by maritime law, the obligations of the ship owner are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations, unless the lien is waived by some express stipulation, or is displaced by one inconsistent and irreconcilable provision in the charter party or bill of lading.<sup>2</sup> A ship cannot by contract exempt itself from liability for general average contribution while the cargo remains subject.<sup>3</sup> By the general maritime law the vessel is bound to the shipper for performance of the contract made with the master, whether by charter party or bill of lading, or by parol.<sup>4</sup> But the master of the vessel cannot subject the ship *in rem*, or his co-owners, to a responsibility for safe carriage, or delivery of the cargo, not actually laden on board of the vessel for transportation in her lawful employment,<sup>5</sup> for the law creates no lien on a vessel for performance of a contract to transfer the cargo till a contract of affreightment is made, and the cargo is delivered to the master.<sup>6</sup>

<sup>1</sup> *The Albany*, 44 Fed. Rep. 431.

<sup>2</sup> *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 494, 18 L. ed. 488; *The Bird of Paradise v. Heyneman*, 72 U. S. 5 Wall. 555, 18 L. ed. 664; *Sears v. Wills*, 66 U. S. 1 Black, 112, 17 L. ed. 35; *The Delaware v. Oregon Iron Co.* 81 U. S. 14 Wall. 579, 20 L. ed. 779.

<sup>3</sup> *The Roanoke*, 53 Fed. Rep. 270.

<sup>4</sup> *The Flash*, Abb. Adm. 67; *The Rebecca*, Ware, 188; *The Phæbe*, Ware, 263; *The Paragon*, Ware, 322; *The Morewood v. Enequist*, 64 U. S. 23 How. 491, 16 L. ed. 516.

<sup>5</sup> *Vandewater v. Mills*, 60 U. S. 19 How. 82, 15 L. ed. 554; *East Anglian R. Co. v. Lythgoe*, 2 Eng. L. & Eq. 333; *Coleman v. Riches*, 29 Eng. L. & Eq. 323; *Montell v. The Wm. H. Rutan*, 1 Int. Rev. Rec. 125.

<sup>6</sup> *The Keokuk v. Home Ins. Co.* ("The Northern Belle") 76 U. S. 9 Wall. 526, 19 L. ed. 746.

Bills of lading do not create a maritime lien against a vessel for the cargo therein mentioned, where the cargo is stored upon a wharf not belonging to the vessel, and in charge of a person not its agent who receives it in storage to hold until the coming of the vessel, and is destroyed by fire before the arrival of the vessel, which is not hailed and does not stop at the landing where the property is stored.<sup>1</sup> The owner of the cargo has a lien upon the ship for the safe custody, transportation and delivery of the cargo.<sup>2</sup> A vessel is liable for the value of a cargo, less only the freight charges, where, upon an ordinary contract of affreightment, the master refuses to deliver the cargo except upon payment of an extortionate demand for demurrage, and the consignee has abandoned it to the ship, although a tender of the amount actually due is not made until some time after the arrival of the vessel.<sup>3</sup> The obligation to unload of charterers under a charter-party by which the vessel is to deliver cargo at any safe birth, as ordered on arrival in dock, does not begin until the vessel is berthed, although a berth is ordered upon her arrival in dock, and she is prevented for some time from getting into it by the crowded state of the dock.<sup>4</sup> A ship which fails to give notice to the consignee of the principal portion of its cargo of tea, of its inability to find a berth for the discharge of cargo in the district in which teas are by long established custom to be delivered, when upon giving such notice a berth might have been found within a reasonable time, is liable to such consignee for the additional expense incurred by him in transporting the cargo from the place where it is delivered.<sup>5</sup> A provision of a charter-party, that cargo shall be taken from alongside the ship where she can lie always afloat, at the charterer's cost and expense, is not inconsistent with a further clause that she shall be discharged according to the custom of the port, so that the latter, being in writing, will prevail over the former, which is printed, and render the ship liable for the increased cost of dis-

<sup>1</sup> *The Guiding Star*, 53 Fed. Rep. 936.

<sup>2</sup> *The Maggie Hammond v. Morland* ("The Maggie Hammond") 76 U. S. 9 Wall. 435, 19 L. ed. 772.

<sup>3</sup> *The Reuben Doud* (D. C. E. D. Mich.) 46 Fed. Rep. 800.

<sup>4</sup> *Tharsis Sulphur & C. Co. v. Morel Bros. & Co.* (C. A.) [1891] 2 Q. B. 647.

<sup>5</sup> *The Mascotte* (D. C. S. D. N. Y.) 48 Fed. Rep. 119.

charge from the fact that she cannot moor alongside the pier, by a custom of the port that cargo shall be discharged on the quay.<sup>1</sup> The custom of a port, of selling fruit by a single firm of auctioneers in restricted quantities, is not imported into a contract of affreightment by the use of the phrase "customary despatch in discharging," since such custom is concerned, not with the business of discharging, but with that of selling, and does not create any impediment to a discharge with despatch which the charterer cannot overcome by ordinary diligence.<sup>2</sup> In computing despatch money under provision of a charter-party that a steamer shall be discharged at a specified rate "per day, weather permitting (Sundays and *fete* days excepted) according to the custom of the port of discharge," and if sooner discharged to pay at a specified rate for every hour saved, Sundays and *fete* days must be excluded, although the vessel is enabled to sail so much earlier than the time specified in the charter as the hours covered by such days.<sup>3</sup> A provision of a charter-party that the vessel is to be reported at the custom-house at the port of destination by a named firm, charterer's agents, or by whom they may appoint, or pay a certain sum as liquidated damages, does not constitute a consignment to such firm, but merely provides for compliance with U. S. Rev. Stat. 2774, requiring the master of a vessel to report arrival and file a manifest,—especially where the charter provides that the vessel is to be consigned to charterers' agents at her port of loading.<sup>4</sup> A limitation in a shipping receipt, providing that all claims against the steamship company or any of its stockholders, and all suits therefor, shall be barred after thirty days from the date of the receipt, does not apply to the vessel so as to prevent a suit in admiralty for such loss.<sup>5</sup> A limitation in a shipping receipt issued by a vessel, requiring all claims for damages to or loss of goods to be presented within thirty days from its date, and prohibiting any suit after thirty days from

<sup>1</sup> *The Nifa* (Div. Ct.) [1892] P. 411.

<sup>2</sup> *Milburn v. 35,000 Boxes of Oranges & Lemons* (C. C. App. 2d C.) 57 Fed. Rep. 236.

<sup>3</sup> *Re Glenderson* (Div. Ct.) [1893] P. 269.

<sup>4</sup> *Mignano v. McAndrews* (C. C. App. 2d C.) 53 Fed. Rep. 958.

<sup>5</sup> *The Queen of the Pacific* (D. C. N. D. Cal.) 61 Fed. Rep. 213.

the date of any such damage or loss, is unreasonable and void.<sup>1</sup> The master may act in good faith and, within the scope of his apparent authority, make a contract of affreightment for the vessel, and, if he neglect to perform such contract, the vessel will be bound in *in rem*.<sup>2</sup> If goods are damaged through fault or neglect of the master or fault of the crew in respect to their storage, the party has a remedy against the vessel as well as against the persons in charge.<sup>3</sup> The ship is hypothecated by marine law, in every contract of affreightment whether by charter party or bill of lading to the shipper for any damage his goods may sustain from the insufficiency of the vessel or the fault of the master or crew.<sup>4</sup> A claim for damages caused by a failure to furnish safe unloading machinery, constitutes a lien on the vessel.<sup>5</sup> The vessel is also liable for damages to goods, partly attributable to bad storage.<sup>6</sup> Also for damages caused by the goods of one shipper to those of another.<sup>7</sup> Claim of shippers of cargo for damage for breach of contract of affreightment is a lien on a vessel, next after that of seamen's wages and before that of materialmen.<sup>8</sup> Where there is no contract or agreement of affreightment, between parties, the vessel is not subject to a maritime lien as security for performance of contract, to transport the cargo.<sup>9</sup> The owner of a cargo has a lien on the vessel for any injury arising from the fault of the vessel or master. When the lien arises from torts committed at sea, it travels with the thing to which it is attached, wherever that goes, and into whosoever hands they may pass.<sup>10</sup>

<sup>1</sup> *The Queen of the Pacific* (D. C. N. D. Cal.) 61 Fed. Rep. 213.

<sup>2</sup> *Jackson v. The Julia Smith*, 6 McLean, 484, Newb. Adm. 61; *The Hendrick Hudson*, 3 Ben. 419, 7 Law Rep. N. S. 93.

<sup>3</sup> *The Waldo*, 2 Ware, 161.

<sup>4</sup> *The Cusco*, 2 Ware, 188; *The Sarah*, 2 Sprague, 30; *Talbot v. Wakeman*, 19 How. Pr. 36.

<sup>5</sup> *The Carolina*, 30 Fed. Rep. 199.

<sup>6</sup> *Brower v. The Water Witch*, 19 How. Pr. 241.

<sup>7</sup> *The Cheshire*, 2 Sprague, 28.

<sup>8</sup> *The Cheshire*, *supra*; *Hatton v. The Melita*, 3 Hughes, 494.

<sup>9</sup> *The Keokuk v. Robson*, 76 U. S. 9 Wall. 517, 19 L. ed. 744. As to procedure to enforce shipper's lien upon vessel, see *The Belfast v. Boon*, 74 U. S. 7 Wall. 624, 19 L. ed. 266.

<sup>10</sup> *Galena D. D. & M. Packet Co. v. Rock Island R. Bridge* ("The Rock Island Bridge") 73 U. S. 6 Wall. 213, 18 L. ed. 753.

A steamship company has no right to confiscate property shipped by it on the ground of a violation of one of its rules or an attempt to defraud it of its freight, or of a supposed attempt to violate the laws of the United States by shipping the goods as baggage.<sup>1</sup>

If the shipper of goods voluntarily accepts the goods at the place of disaster to the vessel, such acceptance terminates the voyage and all responsibility of the carrier, and the master is entitled to freight *pro ratu itineris*. This rule applies in case the ship is disabled or prevented from forwarding them to the port of destination, by a peril or accident not within the exception in the bill of lading. The proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory. It should appear that the acceptance was intended as a discharge of the vessel and owner from any further responsibility, by which the original contract in the bill of lading was rescinded. The above rules apply to an insurance company to which property damaged has been abandoned, after disaster to the vessel.<sup>2</sup>

In cases where the disaster happens in consequence of one of the perils within the exception in the bill of lading, or charter party, the only responsibility of the vessel is to refit, and forward the cargo, or the portion saved; or if that is impracticable, to forward it in another vessel, and the owner is then entitled to freight. If part of the cargo is so far damaged as to be unfit to be carried on, the master may sell it at the intermediate port, as the agent of the shipper, for whom it may concern, and carry on the remainder. In this class of cases the vessel is only responsible for carrying on the cargo, being exempt from any damage by the exception in the contract of affreightment.<sup>3</sup> The same rule, as it respects the effect of the voluntary acceptance of the goods at the place of the disaster, or intermediate port, applies in case the ship is disabled or prevented from forwarding them to the

<sup>1</sup> *Tanco v. Booth*, 39 N. Y. S. R. 82.

<sup>2</sup> *Barrell v. The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406.

<sup>3</sup> *Barrell v. The Mohawk*, *supra*; *Welch v. Hicks*, 6 Cow. 504, 16 Am. Dec. 443; *Abbott, Ship*. 554, 555, and *note*; 1 *Parsons, Ship*. 239, *note* 2; 1 *Parsons, Ship*. 273; *Mande & Pollock, Ship*. 221, 239.

port of destination by a peril or accident not within the exception in the bill of lading.<sup>1</sup>

The only difference between the cases is, that inasmuch as, in the latter case, the vessel is responsible for all the damages that have resulted from the misfortune of the cargo, the proofs of the acceptance of the goods at the intermediate port, in order to operate as a discharge of the vessel, should be clear and satisfactory. The mere acceptance in such cases, and nothing else passing between the parties, ought not to preclude the shipper of his remedy. It should appear from the evidence and circumstances attending the transaction that the acceptance was intended as a discharge of the vessel and owner from any further responsibility—what would be equivalent to a mutual arrangement, express or implied, by which the original contract in the bill of lading was rescinded. The ground of the exemption from responsibility of the vessel, in both cases, is the voluntary acceptance of the goods at the intermediate port.<sup>2</sup>

Freight *pro rata itineris* is not due unless the owner of the cargo voluntarily agrees to receive it at a place short of its ultimate destination.<sup>3</sup> The admiralty courts of this country administer foreign law and the filing of a libel in the district court here secures the same lien on the ship as if the libel were filed in the foreign jurisdiction.<sup>4</sup> Wherever a maritime lien arises on a contract or claim, as in controversies respecting the repairs made or supplies furnished to a ship, or in case of collision, the injured party may pursue his remedy whether it be for breach of mari-

<sup>1</sup> *Osgood v. Groning*, 2 Campb. 471; *Liddard v. Lopes*, 10 East. 526; *The Newport*, Swab. Adm. 335, 342; *Hudley v. Clarke*, 8 T. R. 259; *Spence v. Chodwick*, 10 Q. B. 517; *Abbott*, Ship. 452-455.

<sup>2</sup> *Braithwaite v. Power*, 1 N. D. 455; *Burrell v. The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406; *Columbian Ins. Co. v. Cutlett*, 25 U. S. 12 Wheat. 383, 6 L. ed. 664; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175; *Bark v. Norton*, 2 McLean, 422; *McGaw v. Ocean Ins. Co.* 23 Pick. 405; *Welch v. Hicks*, 6 Cow. 504, 16 Am. Dec. 443.

<sup>3</sup> *Caze v. Baltimore Ins. Co.* 11 U. S. 7 Cranch, 359, 3 L. ed. 370; *Merchants Mut. Ins. Co. v. Butler*, 20 Md. 41; *Richardson v. Young*, 38 Pa. 169; *Rositer v. Chester*, 1 Dougl. (Mich.) 154; *The Teutonia*, L. R. 3 Adm. 394; *Calender v. Insurance Co. of North America*, 5 Binn. 525.

<sup>4</sup> *The Maggie Hammond v. Morland* ("The Maggie Hammond") 76 U. S. 9 Wall. 435, 19 L. ed. 772.

time law or for a marine tort, by a suit *in rem* against the vessel, or by a suit *in personam*, at his election, against the owner, or against the master and owner in cases where they are jointly liable for the alleged default.<sup>1</sup>

### § 131. Overcharge on Freight—Underbilling.

The fact that the shipper has paid the rates illegally charged by the carrier, rather than not have his goods shipped, does not prevent his maintaining an action for money had and received, to recover back the illegal charge.<sup>2</sup> But, if the charges are actually voluntarily paid, there can be no action for their recovery.<sup>3</sup> The recovery for illegal charges, is the excessive rate charges with interest thereon, at least, from the commencement of the action.<sup>4</sup> In an action against a railroad company under the Colorado law to recover the amount paid defendant for freight on coal over and above what it charged another for the like service, plaintiffs are entitled to recover as damages, the amount to which such other was given the preference; whether plaintiffs lost profits upon the sale of their coal by reason of the non-allowance of such rebates as were given to another on freight, is too remote to be made an element of their damages.<sup>5</sup> The common law remedy against carriers for overcharges beyond reasonable compensation is abrogated by Kan. Gen. Stat. 1889, §§ 1333, 1334, 1342, giving a full remedy to the shipper for recovering back any such excess, and allowing three times the excess, with attorneys' fees and costs.<sup>6</sup>

A notice of an overcharge on freight shipped, presented to the railway company's local agent, who succeeded the agent who received the overcharge, which fails to give sufficient data to enable him to find the record of the shipment in the company's books, is

<sup>1</sup> *Pendergast v. The Kalorama* ("The Kalorama") 77 U. S. 10 Wall. 204, 19 L. ed. 941; *The Belfast v. Boon*, 74 U. S. 7 Wall. 624, 19 L. ed. 266.

<sup>2</sup> *Mobile & M. R. Co. v. Steiner*, 61 Ala. 559.

<sup>3</sup> *Arnold v. Georgia R. & Bkg. Co.* 50 Ga. 304.

<sup>4</sup> *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 472.

<sup>5</sup> *Union Pac. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896.

<sup>6</sup> *Beadle v. Kansas City, Ft. S. & M. R. Co.* 51 Kan. 248.



insufficient under Sayles's Tex. Civ. Stat. art. 4258*b*, § 10, providing that penalties for such overcharges shall not be recoverable unless the party aggrieved shall give notice thereof in writing to the railway company or to the agent demanding or receiving the same.<sup>1</sup> The retention of an overcharge has all the effect of extortion and unjust discrimination against the person from whom its payment has been required, and when the refund of an excessive charge has been unnecessarily delayed for a considerable period the officials responsible therefor become fairly chargeable with willful intention to violate the law.<sup>2</sup> A person, whether a shipper or consignee, who pays excessive rates to a carrier, is entitled to recover back the excess.<sup>3</sup>

If a common carrier makes a special contract to repay part of the sum received from the shipper, he must perform his part of the contract unless he overthrows the presumption of fairness and right by countervailing facts.<sup>4</sup> It may be true that the money was paid without duress of person or goods, but if it was paid, not only without knowledge that it was a wrongful exaction, but in the belief of the truth of the positive assertions of the carrier that no shipper was allowed any rebate, such a payment is not voluntary.<sup>5</sup>

A carrier is liable for loss upon nursery stock by its freezing while it is withheld from the consignee under an unjustifiable claim for freight in excess of that specified in the bill of lading issued by a connecting carrier having a right to make a through rate, and which is exhibited to its agent, although no tender or demand is made by the consignee.<sup>6</sup> Damages suffered by goods passing over a continuous line of transportation, the freight being

<sup>1</sup> *Sabine & E. T. R. Co. v. Cruse*, 83 Tex. 460.

<sup>2</sup> *Phelps v. Texas & P. R. Co.* 4 Inters. Com. Rep. 363.

<sup>3</sup> *Mount Pleasant Mfg. Co. v. Cape Fear & Y. V. R. Co.* 106 N. C. 207, 42 Am. & Eng. R. Cas. 498.

<sup>4</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 3 Inters. Com. Rep. 387, 9 L. R. A. 754, 126 Ind. 348.

<sup>5</sup> See 1 *Parsons*, Cont. 466, and *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 732; *Cook v. Chicago, R. 1. & P. R. Co.* 2 Inters. Com. Rep. 383, 9 L. R. A. 764, 81 Iowa, 551.

<sup>6</sup> *Milton v. Denver & R. G. R. Co.* 1 Colo. App. 307.

divided among the different carriers in fixed proportions, may be set off in an action by one of the railroad companies to recover the freight, although the injury happened on another section of the line.'

Where an individual becomes the assignee of the purchaser under proceedings instituted by the state against delinquent railroads, and continues to operate under the charter of the original corporation, collecting excessive freights,—the individual will be treated, not as the corporation, but is liable as an individual, for his excessive charges.<sup>2</sup> In the case of *Shipper v. Pennsylvania R. Co.*, 47 Pa. 338, the action was brought to recover an overcharge of freight. The court, speaking of defendant's charter, says, on page 340: "There is no expressed stipulation that the rates shall be equal to all who may offer goods for transportation over the road; such stipulations are common in English charters. They are however, declaratory of what the common law is."

A shipper cannot recover a rebate which a carrier verbally agreed to give when a bill of lading containing no such provision was afterwards given, except where there has been published and posted in the carrier's office an order allowing authorized special rates for certain classes of freight, and directing the freight to be paid at the regular tariff rates, the overcharge to be refunded upon application.<sup>3</sup> A shipper cannot recoup damages done by one connecting carrier against a subsequent carrier's claim for freight, where he was present when it received the property and made no objection, though he informed it of the damage and intimated his intention to demand compensation from the previous carrier.<sup>4</sup> A shipper cannot recover the value of goods sold for freight and storage charges, which he has refused to accept from a railroad company because one of a number of boxes was missing.<sup>5</sup> In an action against a railroad company to recover back freight paid in excess of that charged to other shippers, in ab-

<sup>1</sup> *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427.

<sup>2</sup> *Ragan v. Aiken*, 9 Lea, 609, 42 Am. Rep. 684.

<sup>3</sup> *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 9 Ry. & Corp. L. J. 451.

<sup>4</sup> *St. Louis, I. M. & S. R. Co. v. Lear*, 54 Ark. 399.

<sup>5</sup> *Gulf, C. & S. F. R. Co. v. Booton* (Tex. App.) March 15, 1890.

sence of evidence that defendant corporation was a party to discriminating arrangements, plaintiff cannot recover.<sup>1</sup>

Where a carrier not subject to the Act to Regulate Commerce, for example, a steamboat plying the Tennessee river between Decatur, Alabama, and Bridgeport, in the same state, has applied to rail carriers engaged in interstate commerce for through rates and through billing of freight and has been refused these, and during a period of several years has paid these rail carriers their local published tariff rates on freight, and now sues to recover the difference between the amount so paid on the local rates and the proportion of the through rate between the same points covered by the local rates, no recovery can be had in such a proceeding before the Interstate Commerce Commission.<sup>2</sup> The fact that a railway company falsely represents to a shipper that the rate charged him is the through rate over the connecting lines will not entitle the shipper to recover the difference between the rate charged him and the smaller rate agreed upon by the connecting companies, on the ground of extortion, unless the rate charged him is unreasonable, or he was induced by the fraud to ship over that line instead of some other which would have carried the goods for less.<sup>3</sup> An action for a rebate on freight bills cannot be maintained where the arrangement for the lower rate was obtained by a suppression of the truth in regard to a competing rate.<sup>4</sup> Where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate, but the declaration did not allege either that no rates had been fixed for the defendant's road or that the charges were beyond the rates so fixed, it was demurrable.<sup>5</sup> A person who has received the benefit of a special rate which unlawfully discriminates in his favor cannot complain because, for the return shipment, he is charged the same as the general public.<sup>6</sup> Where the purchaser of grain, under

<sup>1</sup> *Rothchild v. Wabash, St. L. & P. R. Co.* 92 Mo. 91.

<sup>2</sup> *Capehart v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 278.

<sup>3</sup> *Arkansas & L. R. Co. v. Smith*, 4 Inters. Com. Rep. 415, 42 Am. & Eng. R. Cas. 343.

<sup>4</sup> *Jacksonville S. E. R. Co. v. Rabbit*, 29 Ill. App. 283.

<sup>5</sup> *Sorrell v. Central R. Co.* 75 Ga. 509.

<sup>6</sup> *Elzey v. Illinois Cent. R. Co.* 2 Inters. Com. Rep. 804.

the terms of his contract, paid the freight but refused to receive the grain, and the contract of sale was rescinded, there can be no recovery from the carrier of the freight paid.<sup>1</sup> Where the carrier is charged with conversion of goods shipped as first class, and it is proved that they were in fact double first class, the carrier is entitled to the latter rate.<sup>2</sup>

The statute of limitations does not begin to run against the claim of a shipper to recover back excessive payments of freight charges so long as he has no knowledge of his rights, owing to the fraudulent concealment of the cause of action by the carrier.<sup>3</sup> A carrier is not restricted as to the amount it may recover for the transportation of freight, by the rate stated in the bill of lading, where the rate was obtained by a misrepresentation of the shipper's agent as to the class to which the freight belonged, whether made innocently or not, but may recover the rate for the class to which it belongs where the mistake is discovered before delivery.<sup>4</sup> A consignee, though a factor only, is liable for any balance of freight due, according to the statements of the bill of lading, on account of the excess of the real value of the goods over that named in the bill of lading, which was known to him but concealed from the carrier, although on delivery of the goods he paid all the freight which the carrier then supposed to be due.<sup>5</sup>

### § 132. *Rate Sheets.*

Common carriers engaged in the transportation of passengers or property, for a continuous carriage or shipment from a place in the United States to a place in an adjacent foreign country, are subject to the provisions of the Act in respect to the printing of schedules of rates, fares, and charges for the traffic they carry, the posting and filing with the Interstate Commerce Commission of copies of such schedules, the notices of advances and reductions, and the maintenance of the rules, fares, and charges established

<sup>1</sup> *Jack v. Des Moines & Ft. D. R. Co.* 53 Iowa, 399.

<sup>2</sup> *Rice v. Indianapolis & St. L. R. Co.* 3 Mo. App. 27.

<sup>3</sup> *Carrier v. Chicago, R. I. & P. R. Co.* 6 L. R. A. 799, 79 Iowa, 80.

<sup>4</sup> *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.* 1 Tex. Civ. App. 553.

<sup>5</sup> *North German Lloyd v. Henle*, 10 L. R. A. 814, 44 Fed. Rep. 100.

and published and in force at the time; also to the provisions in respect to joint tariffs of rates, fares, and charges for continuous lines or routes.<sup>1</sup> And of the law regarding the posting of the shipping rules and regulations, the plaintiff is conclusively presumed to have had knowledge.<sup>2</sup>

But it is said by the supreme court of Connecticut that a pamphlet hanging in a railroad company's office, containing rules and rates, is not, of itself, constructive notice of its contents. Nor is this a case for the application of the ordinary, but not universal, rule that full and adequate means of knowledge are equivalent to knowledge itself. It will not do to hold that, where a shipper and common carrier contract about the carrying of freight and the rate to be paid, without reference to the fact that there are printed rules upon the subject, and of the existence of which the shipper is ignorant, he shall be held to have constructive knowledge of the rules, even though the interstate commerce acts required them to be posted.<sup>3</sup>

The rates which carriers are required by the Act to Regulate Commerce, § 6, to publish, file, and adhere to without deviation, cover not merely the carriage, but services rendered in receiving and delivering property as well.<sup>4</sup> A joint tariff of rates or charges must show on its face what carriers will unite in establishing it.<sup>5</sup> Methods generally adopted by carriers in the preparation and publication of rate checks, if in substantial compliance with the law and sufficient for purposes of public information, while not necessarily to be accepted by the commission as a standard, may be acquiesced in until a better mode can be substituted.<sup>6</sup>

Common carriers are required to post in their depots, stations, and offices, schedules showing the rates and charges for transportation in force on their routes, as well on freight which is for

<sup>1</sup> *Re Grand Trunk R. Co.* 2 Inters. Com. Rep. 496.

<sup>2</sup> *East Hartford v. American Nat. Bank*, 49 Conn. 539; *Upton v. Tribilcock*, 91 U. S. 50, 51, 23 L. ed. 205, 206.

<sup>3</sup> *Coppland v. Housatonic R. Co.* 15 L. R. A. 534, 61 Conn. 531.

<sup>4</sup> *Phelps v. Texas & P. R. Co.* 4 Inters. Com. Rep. 363.

<sup>5</sup> *Lehman v. Texas & P. R. Co.* 3 Inters. Com. Rep. 706.

<sup>6</sup> *Re Passenger Tariffs*, 2 Inters. Com. Rep. 445.

export as on that which is not.<sup>1</sup> The publication of inland joint tariffs for the transportation of foreign merchandise, and of advances and reductions, should be made by posting in a public place at the depot of the carrier where the freight is received in the port of entry, and also where it is delivered at the place of destination in the United States.<sup>2</sup> When an export tariff is established, and ocean rates not specified, the tariff as filed should show the rate charged by the inland carrier to the point of export, including terminal charges and expenses, and should also show in what manner the through rate to the point of ultimate destination is to be determined.

Under the amendments of March 2, 1889, to the Interstate Commerce Act, requiring ten days' previous notice of advances and three days' previous notice of reductions in rates, they cannot be varied from day to day, or oftener, to meet fluctuations in ocean rates.<sup>3</sup> A railroad company is not exempted from liability for establishing a tariff in violation of the provisions of the Interstate Commerce Law, by the fact that such tariff was established by a joint arrangement between it and other lines connecting with it.<sup>4</sup> The publication of inland joint tariffs for the transportation of foreign merchandise, and of advances and reductions, should be made by posting in a public place at the depot of the carrier where the freight is received in the port of entry, and also where it is delivered at the place of destination in the United States.<sup>5</sup> Common carriers are required to post in their depots, stations, and offices, schedules showing the rates and charges for transportation in force on their routes, as well on freight which is for export as on that which is not.<sup>6</sup> The filing of schedules of rates with the commission as required by statute

<sup>1</sup> *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.* 3 Inters. Com. Rep. 523.

<sup>2</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* 3 Inters. Com. Rep. 417.

<sup>3</sup> *New York Produce Exch. v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 553.

<sup>4</sup> *Junod v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 663, 47 Fed. Rep. 290.

<sup>5</sup> *New York Board of Trade & Transportation v. Pennsylvania R. Co.* *supra*.

<sup>6</sup> *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.* 3 Inters. Com. Rep. 523.

raises no presumption as to the legality of such rates, and no omission or failure to challenge or disapprove the schedules of rates so filed can have the effect of making rates lawful which are unreasonable.<sup>1</sup>

When the purposes of the Act seem to be fully accomplished by rate sheets as printed, and no one complains, the commission may not feel inclined to interfere on its own motion where sheets are printed in smaller type than prescribed by Act.<sup>2</sup> Any one member of a joint combination may file copies of joint tariff for all the members.<sup>3</sup> Neglect to publish rates for mileage tickets is violation of Act.<sup>4</sup> Joint tariffs should be printed in ordinary type, and copies kept at every depot or station upon the line of the carriers uniting therein.<sup>5</sup> Common carriers must take all descriptions of all ordinary traffic from all points, and the rates should be known and announced publicly in advance of the offering of traffic. Under the Act to Regulate Commerce shippers are entitled to equal and open rates at all times, and are not to be required to ask for rates.<sup>6</sup>

Under the provisions of the Act to Regulate Commerce, the Grand Trunk Railway Company of Canada is required to print, post, and file its schedule of rates and charges for the transportation of property from points in the United States to points in Canada, and cannot lawfully charge, demand, collect, or receive from any person or persons a greater or less compensation therefor, or for any services in connection therewith, than is specified in such published schedule as may at the time be in force.<sup>7</sup> Terms for rolling stock for transportation of petroleum oil should be uniform and published with rate sheets.<sup>8</sup> Under the amendments of March 2, 1889, to the Act to Regulate Commerce, requiring

<sup>1</sup> *San Bernardino Board of Trade v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 138.

<sup>2</sup> *Re Rate Sheets*, 1 Inters. Com. Rep. 316.

<sup>3</sup> *Re Filing Copies of Joint Tariff*, 1 Inters. Com. Rep. 76.

<sup>4</sup> *Larrison v. Chicago & G. T. R. Co.* 1 Inters. Com. Rep. 369.

<sup>5</sup> *Order as to Publication of Joint Tariffs*, 1 Inters. Com. Rep. 598.

<sup>6</sup> *Re Tariffs of Transcontinental Lines*, 2 Inters. Com. Rep. 203.

<sup>7</sup> *Re Grand Trunk R. Co.* 2 Inters. Com. Rep. 496.

<sup>8</sup> *Rice v. Louisville & N. R. Co.* 1 Inters. Com. Rep. 722.

ten days' previous notice of reductions in rates, they cannot be varied from day to day, or oftener, to meet fluctuations in ocean rates. Whenever a tariff is established for merchandise billed or intended for export by sea, and ocean rates are not specified, either because of fluctuations or for any other reason, so that only the charge for inland transportation is definitely fixed, the tariff as filed and made public should show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges and expenses, and should also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise.<sup>1</sup>

In ruling upon a violation of the law the commission says that it appears that the Southern Pacific Company and the Atchison, Topeka & Santa Fé Railroad Company each has several stations on their lines at which no publication is made in their tariffs of the rates at these stations,—and this they admit; and the commission finds that this conduct on their part has been owing to a misapprehension and misconstruction of the law and in accordance with a usage and practice long existing among railroads; the commission therefore orders them to make publication of the rates they charge at these stations in their tariffs,<sup>2</sup> and that where a carrier corrects the inequality of rates complained of and thus makes all the reparation asked in the complaint, or that the commission could afford, no order is required, and none will be issued.<sup>3</sup> Under state statute it has been ruled that it is the duty of railroad companies to post and keep continuously posted as provided by General Rule 4 of the Florida Railroad Commission, whatever falls within its provisions, it being insufficient to furnish posters to agents, with instructions to post them, and that nailing up by one corner in a conspicuous place in a railroad station, in such manner as to be accessible to every one, a pamphlet of several pages containing transportation rules and regulations or classifica-

<sup>1</sup> *New York Produce Exch. v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 553.

<sup>2</sup> *Rice v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. Rep. 263.

<sup>3</sup> *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.* 3 Inters. Com. Rep. 523.



tions; or the binding together of such pamphlets and schedules, and placing them conspicuously upon a shelf desk in the agent's office—is not a compliance with Florida Railroad Commission Rule 4, requiring a schedule of rates, etc., to be conspicuously posted in each station.

A railroad company having, under Freight Rule 3 of the Florida Railroad Commission, the right to make at its discretion special rates reduced below commission rates for particular persons and places, for temporary use, need not post such special rates, under the requirements of General Rule 4. A table which does not give the distance between any two railroad stations is not a table of distances, within the Florida Railroad Commission Rule 4. It is not sufficient for the schedule merely to supply data for computing the distances. Passenger Rule 6 and Freight Rules 3 and 11 of the Florida Railroad Commission are applicable to the Pensacola & Atlantic Railroad Company, and should be posted like other rules applicable to it. The fact that a passenger rate schedule is in two parts or on two cards, instead of one, is not, where the two cards may be posted together and read as one, of itself a violation of the rule of the Florida Railroad Commission requiring the schedule to be posted.<sup>1</sup>

### § 133. *Rebate.*

For the carrier to pay the larger expense of the transportation of a remote shipper's merchandise to the station, and not to pay the less expense of such transportation of the nearer shipper's merchandise, would be the equivalent of a rebate to the former, the railroad service proper being the same to each and at the same rate; nor would it be treating all patrons with statutable equality to bear a part of the cartage expense for one shipper and not bear a part of it for another.

In the case of *Hezel Milling Co. v. St. Louis, A. & T. H. R. Co.*, 3 Inters. Com. Rep. 701, the rates for the transportation of flour originating at St. Louis or East St. Louis and shipped over

<sup>1</sup> *State v. Pensacola & A. R. Co.* 27 Fla. 403, 46 Am. & Eng. R. Cas. 704.

defendants' lines are the same, and such flour is forwarded by the first named defendant from its receiving station in East St. Louis. Shippers in St. Louis deliver flour to rail or wagon transfer companies at their stations in St. Louis and defendants bear the cost of transfer to said receiving station, the average being about six cents per barrel, or St. Louis shippers sometimes deliver to the wagon transfer company at their mill doors and then bear half of the cartage expense by wagon, the defendants the other half. Petitioner, who is a manufacturer and shipper of flour over defendants' lines in competition with St. Louis millers, teams flour from its mill about one half a mile to said receiving station at East St. Louis at a cost of six cents a barrel, or loads it on cars furnished by the defendants on a side track contiguous to said mill at a cost of about three cents a barrel, being required to so load such cars that the lot for the nearest station is placed in the forward part of the train and lots for other stations are arranged consecutively, according to distance, and also being required to clean and repair such cars before using. The commission held that on flour destined to points outside the state which the initial carrier requests petitioner to haul to its station, or which petitioner is compelled to haul there by reason of proper cars not being furnished on said side track for loading, petitioner is entitled to a reduction of six cents a barrel from rates in force as long as defendants bear that amount of the cost of cartage for other shippers, and that defendants' rule requiring petitioner to clean and repair cars furnished on said side track is unreasonable, but the requirement that petitioner shall load such cars according to stations is, in view of counter advantages, not unreasonable, and rates on flour loaded by petitioner in properly cleansed and repaired cars so furnished are, upon the facts, properly the same as rates in force on shipments of flour originating in St. Louis. With reference to the transportation of flour it is said defendants seem to treat St. Louis and East St. Louis as a single business community; therefore, they cannot complain if this case is determined upon that theory. Taking petitioner's flour in cars from its mill is presumably equal in value to its expense of hauling by team; therefore, petitioner cannot complain that the carriers bear a portion

of the cartage expense of the St. Louis millers equal to the benefit it receives from being able to deliver on the side track at its mill, and the commission says questions arising under a practice of partial or absolute free cartage, or growing out of the existence of side tracks to shippers' doors, must depend largely for solution on the particular circumstances of each case.<sup>1</sup>

A shipper from whose mill flour is taken in cars cannot complain that the carrier bears a portion of the cartage expenses of other millers.<sup>2</sup> A rebate in freight not in itself constituting an unlawful discrimination by a carrier is not made such by the fact that it is kept secret between the parties.<sup>3</sup> There is nothing in the Interstate Commerce Law which vitiates bills of lading, or which, by reason of an allowance of a rebate to the agents of the owners or consignees of goods, if actually made, would invalidate the contract of affreightment or exempt a railroad company from liability on its bills of lading.<sup>4</sup> But an agreement between a shipper of merchandise and a favored customer of a carrier to whom the latter allows a rebate on the freight, by which such shipper ships under such customer's name and the latter receives a rebate thereon, is illegal and contrary to public policy; and such rebate cannot be recovered from such customer by the shipper.<sup>5</sup> Many cases might be cited to show that, at common law, all such special terms and favoritism are illegal.<sup>6</sup>

Arrangements by which shippers are allowed to furnish improved stock cars, receive extraordinary mileage upon them amounting to large rebates on their rates, and determine whether other competitive shippers shall forward freight in them or not,

<sup>1</sup> *Hezel Milling Co. v. St. Louis, A. & T. H. R. Co.* 3 Inters. Com. Rep. 701.

<sup>2</sup> *Macloon v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>3</sup> *Hoover v. Pennsylvania R. Co.* 156 Pa. 220.

<sup>4</sup> *Merchants Cotton Press & S. Co. v. Insurance Co. of North America*, 151 U. S. 368, 38 L. ed. 195.

<sup>5</sup> *Huwley v. Kansas & T. Coal Co.* 48 Kan. 593.

<sup>6</sup> *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 13 Am. Rep. 457, is a representative case in which Beasley, Ch. J., states the doctrine of the common law with great clearness and force. See also *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370, 8 Am. Rep. 195; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 13 Am. Rep. 72; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Pierce, Railroads*, 498.

—are unlawful.<sup>1</sup> A promise by a carrier's agent to give a rebate on freight charges, thereby discriminating against other shippers, is void.<sup>2</sup> Such an agreement is illegal at common law.<sup>3</sup> The allowance of a rebate by a common carrier to certain of his customers from the tariff rates charged other customers for precisely similar services is sufficient of itself to show that the rates charged the latter were unreasonable, and that there was unjust discrimination against them, illegal by the common law, which will give the latter a right to recover the amounts paid by them in excess of the rates charged the former after deducting the rebates.<sup>4</sup>

Where a carrier agrees that he will carry goods at a certain rate, and that after the shipment he will repay the shipper a rebate of part of such rate, this is only an agreement to carry the goods at a compensation ultimately agreed upon, and is not illegal.<sup>5</sup> Existing contracts for special freight rates, or rebates from regular tariff rates, which had been made with railroad companies subject to the Interstate Commerce Act, became illegal when the Act took effect, and were after that time incapable of enforcement.<sup>6</sup> An agreement between a carrier and a miller to give the latter a rebate on coal shipped to him, used in the manufacture of corn into meal, is valid under Alabama Code 1886, § 1161, where public notice by the general freight agent authorized such rebate on coal used in manufacturing.<sup>7</sup>

<sup>1</sup> *Shamberg v. Delaware, L. & W. R. Co.* 3 Inters. Com. Rep. 502.

<sup>2</sup> *Indianapolis, D. & S. R. Co. v. Davis*, 32 Ill. App. 67.

<sup>3</sup> *Fitzgerald v. Grand Trunk R. Co.* 13 L. R. A. 70, 3 Inters. Com. Rep. 633, 63 Vt. 169.

<sup>4</sup> *Cook v. Chicago, R. I. & P. R. Co.* 9 L. R. A. 764, 3 Inters. Com. Rep. 383, 81 Iowa, 551.

<sup>5</sup> *Cleveland, C. C. & I. R. Co. v. Closser*, 9 L. R. A. 754, 3 Inters. Com. Rep. 387, 126 Ind. 348.

<sup>6</sup> *Bullard v. Northern Pac. R. Co.* 11 L. R. A. 246, 3 Inters. Com. Rep. 536, 10 Mont. 168.

<sup>7</sup> *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 9 Ry. & Corp. L. J. 451.

## CHAPTER XXI.

### DELIVERY OF GOODS.

- § 134. *Place of Delivery by Carrier on Land.*
- § 135. *Time and Manner of Delivery—Custom, see ante § 33—Law of Contract, see ante § 19.*
- § 136. *Delivery to Proper Person—Bill of Lading—Draft. See §§ 25, 29–31.*
- § 137. *Notice to Consignee of Arrival of Goods.*
- § 138. *Collections by Carrier—Sale of Goods. See ante, §§ 1a, 32.*
- § 139. *Delivery to Wrong Person—Conversion.*
- § 140. *Delivery in Bad Condition—Shortage. See ante, § 40.*
- § 141. *Failure to Deliver.*
- § 142. *Statutory Penalties for Non-Delivery.*
- § 143. *What will Excuse Non-Delivery of Goods.*

#### § 134. *Place of Delivery by Carrier on Land.*

The duty of a common carrier is not merely to carry safely the goods entrusted to him, but also to deliver them to the party designated by the terms of the shipment, or to his order. They are to be delivered at the place and destination, to the party designated to receive them, if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier is more strictly enforced.<sup>1</sup> The duty of the carrier extends to all that relates to loading, safe keeping and transportation, and right delivery; and for all these he is liable.<sup>2</sup> He is chargeable with damages occasioned by the delay in delivering the goods;

<sup>1</sup> *Forbes v. Boston & L. R. Co.* 133 Mass. 154; *McEntee v. New Jersey S. B. Co.* 45 N. Y. 34, 6 Am. Rep. 28; *North Pennsylvania R. Co. v. Commercial Nat. Bank of Chicago*, 123 U. S. 727, 31 L. ed. 287.

<sup>2</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Germania Ins. Co. v. The Lady Pike*, 88 U. S. 21 Wall. 15, 22 L. ed. 503; *The Niagara v. Cordes*, 62 U. S. 21 How. 27, 6 L. ed. 47; *Laveroni v. Drury*, 8 Exch. 166; *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 51, 17 L. ed. 611; *Richardson v. Winsor*, 3 Cliff. 402.

and diminution in value is properly chargeable as an item.<sup>1</sup> The destination of goods is a railroad station, and not a village of the same name several miles away in which the consignee had his place of business; and a baggage room at the station is a warehouse, within the meaning of a bill of lading fixing the time when the carrier's liability should cease.<sup>2</sup>

Where the contract of carriage requires that the goods shall be personally delivered by the carrier, due diligence must be used to ascertain the proper address and make tender of the goods to the person at his place of business. If there be a particular address, by street and number, the tender must be made there.<sup>3</sup> As a general rule, common carriers by wagons are required to deliver the goods to the consignee at his house or place of business and their liability as such continues until such delivery. But, this rule does not apply to vessels on the seas, lakes or navigable rivers, or to railroads. A warehouse or depot, at the town or station to which goods are to be shipped by railroad, is the proper place of delivery to the consignee. When they are discharged from the cars, and in the absence of the consignee, are safely stored in the company's warehouse, the liability of the railroad as common carrier has terminated with notice to the consignee of the arrival of the goods.<sup>4</sup> But transportation by steamboats and railroads is necessarily such that the wharves of the former and the depots of the latter are their places of delivery.<sup>5</sup> Still, if streetage, or charges for transportation to a locality on a street distant from the carrier's depot or wharf, has been charged in addition to the freight, it imposes a duty of delivery at the point for which the additional charges have been made.<sup>6</sup> If the carrier, having no warehouse,

<sup>1</sup> *Wilson v. Lancashire & Y. R. Co.* 9 C. B. N. S. 632; *Kent v. Hudson River R. Co.* 22 Barb. 278; *Rowe v. The City of Dublin*, 1 Ben. 56. But consult *Jones v. New York & E. R. Co.* 29 Barb. 633.

<sup>2</sup> *Richardson v. Canadian Pac. R. Co.* 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

<sup>3</sup> *Schroeder v. Hudson River R. Co.* 5 Duer, 55; *Witbeck v. Holland*, 45 N. Y. 130.

<sup>4</sup> *Bansemer v. Toledo & W. R. Co.* 23 Ind. 434, 87 Am. Dec. 367.

<sup>5</sup> *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 468.

<sup>6</sup> *Baltimore & O. R. Co. v. Green*, 25 Md. 72.

is directed by the shipper to leave the goods at a particular place, the liability of carrier terminates with the deposit.<sup>1</sup>

A railway company, having put loaded cars upon a side track to be unloaded by the owners of the freight, has no right, without special notice or warning, to run or back a train upon such side track while the cars are being unloaded, and if it does so is liable for injuries thereby caused to the persons unloading.<sup>2</sup> On a consignment of a carload of brick to a person at a point where there was no depot, warehouse, agent, or even side track, it is the duty of the carrier, in case the consignee is not present to receive the brick, to unload them and leave them there on the ground; and the carrier has no right, because the consignee is not present, to carry them on to the next station and leave them on a side track.<sup>3</sup> A contract of affreightment for transportation to and delivery at a certain point to the consignees imposes on a contracting company only the duty of affording the consignees an opportunity to receive and take away their property, and involves no duty, in the absence of any custom or usage, to deliver the car to another company for ultimate delivery at a more convenient place.<sup>4</sup>

Although the consignee of goods may change his instructions as to their destination in the hands of any carrier, where no bill of lading has been delivered, which cannot be recalled,<sup>5</sup> and substitute a different place of delivery, he must do so during the transit, and not after their destination has been reached and the carrier's obligation fulfilled. In the absence of a custom authorizing the agent of a carrier, at the request of the consignee, to

<sup>1</sup> *Rowe v. Pickford*, 8 Taunt. 83, 1 Moore, 526; *Allan v. Gripper*, 2 Crompt. & J. 218, 2 Tyrw. 217; *Richardson v. Goss*, 3 Bos. & P. 119; *Scott v. Pettit*, 3 Bos. & P. 472; *Dixon v. Baldwin*, 5 East, 181.

<sup>2</sup> *Gessley v. Missouri Pac. R. Co.* 32 Mo. App. 413.

<sup>3</sup> *Louisville & N. R. Co. v. Gilmer*, 89 Ala. 534, 42 Am. & Eng. R. Cas. 450.

<sup>4</sup> *Melbourne v. Louisville & N. R. Co.* 88 Ala. 443.

<sup>5</sup> *Blanchard v. Page*, 8 Gray, 281; *Sutherland v. Second Nat. Bank of Peoria*, 78 Ky. 250; *Hubbersty v. Ward*, 8 Exch. 330; *Chaffee v. Mississippi & T. R. Co.* 59 Miss. 182; *Philadelphia & R. R. Co. v. Wire Man*, 88 Pa. 264; *Mitchel v. Ede*, 11 Ad. & El. 888; *Waldron v. Romaine*, 22 N. Y. 363; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Bushel v. Wheeler*, 15 Q. B. 442; *Bailey v. Hudson River R. Co.* 49 N. Y. 70; *Hartwell v. Louisville & N. R. Co.* 15 Ky. L. Rep. 778.

undertake, after the car has reached its destination, a delivery thereof at another place and to another party than the consignee, an arrangement between the latter and the agent cannot fix any liability on the company on account of the negligence of the agent in carrying it out.<sup>1</sup>

A carrier cannot relieve itself from liability for conversion of goods which it has unjustifiably transported to another place than their destination for the purpose of preventing their coming to the possession of the consignee and depriving him of their control and disposition, by tendering him the goods after he has commenced an action for their conversion.<sup>2</sup> And the same result follows where the goods are carried to a different station from the one designated, and there stored.<sup>3</sup>

A common carrier who, having received goods to be carried to a designated place, transports them to another place, to prevent their coming to the possession of the consignee and deprive him of their use and disposition, is liable for conversion of the goods. After such conversion, the consignee is under no obligation to receive the goods; and it is no defense to his action for their value that they were tendered to him after the conversion, and then stolen without the negligence of the carrier. The motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown when exemplary damages are claimed.<sup>4</sup> Where goods are shipped, with freight prepaid, to a former station agent at a prepaid station, and upon arrival of the train the conductor informs him that he has freight for him, but he answers that he cannot receive it as he has been removed as agent, upon which the conductor carries the goods to the next station, where they perish, the company is liable for their value.<sup>5</sup> An effort to deliver the goods to the consignee must be

<sup>1</sup> *Melbourne v. Louisville & N. R. Co.* 88 Ala. 443.

<sup>2</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489.

<sup>3</sup> *Toledo, W. & W. R. Co. v. Hammond*, 33 Ind. 379, 5 Am. Rep. 221.

<sup>4</sup> *Baltimore & O. R. Co. v. O'Donnell*, *supra*.

<sup>5</sup> *Edwards v. Cheraw & D. R. Co.* 32 S. C. 117.



made at a proper place, at a proper time and in a proper manner,<sup>1</sup> and the hours in which the delivery can be tendered are regulated by the custom of business in the particular line in which the consignee is engaged.<sup>2</sup>

§ 135. *Time and Manner of Delivery—Custom,*  
*see ante, § 33—Law of Contract, see ante, § 19.*

Delivery at the proper time excludes holidays;—and in certain classes of goods a delivery during a storm is not permissible.<sup>3</sup> Custom is often an important element in determining the proper time and place of delivery.<sup>4</sup> A custom at a port of delivery becomes part of the contract.<sup>5</sup> The delivery of goods at the port of destination is governed by the particular usages of trade,<sup>6</sup> as to time and mode.<sup>7</sup> The carrier has the right to discharge cargo on a voluntary holiday,—such as a day appointed by the governor for fasting and prayer, and demand the acceptance of his freight on that day, by the consignee, where there is no law of the state which forbids the transaction of business on that day. Where there is no special custom of the port which forbids the carrier from unloading his vessel on such days, and as there is no general custom or usage which forbids the unloading of vessels and a tender of freight to the consignee, on a day set apart for a church festival, fast or holiday, a tender may be made at such

<sup>1</sup> *Eagle v. White*, 6 Whart. 505, 37 Am. Dec. 434; *Hill v. Humphreys*, 5 Watts & S. 123, 39 Am. Dec. 117; *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 271, 61 Am. Dec. 423; *Cope v. Cordova*, 1 Rawle, 203; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389; *Goold v. Chapin*, 10 Barb. 612; *Garside v. Trent & M. Nav. Proprs.* 4 T. R. 581; *Thomas v. Boston & P. R. Corp.* 10 Met. 472, 43 Am. Dec. 444; *Fisk v. Newton*, 1 Denio, 45, 43 Am. Dec. 649; *Porcell v. Myers*, 26 Wend. 591; *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>2</sup> *Mercin v. Butler*, 17 Conn. 138; *Marshall v. American Exp. Co.* 7 Wis. 1, 73 Am. Dec. 381; *Young v. Smith*, 3 Dana, 92, 28 Am. Dec. 57.

<sup>3</sup> *Ely v. New Haven S. B. Co.* 53 Barb. 207; *The Grafton*, 1 Blatchf. 173.

<sup>4</sup> *Shelton v. Merchants Dispatch Transp. Co.* 59 N. Y. 258; *Sleade v. Payne*, 14 La. Ann. 453.

<sup>5</sup> *The Glover*, 1 Brown, Adm. 166; *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>6</sup> *Blossom v. Smith*, 3 Blatchf. 316; *Gibson v. Stevens*, 3 McLean, 563; *Chaplin v. Rogers*, 1 East, 192; *Atkinson v. Maling*, 2 T. R. 462; *Higgins v. United States Mail SS. Co.* 3 Blatchf. 282.

<sup>7</sup> *Higgins v. United States Mail SS. Co.* *supra*.

time. By the Canon Law, the observance of these days did not extend "to those who sold provisions;" "to posts or public conveyances;" "to travelers;" "to carriers by land or water;" "to the lading and unlading of ships engaged in maritime commerce."

In England and other Protestant countries, while a more strict observance of the Lord's Day is enforced by statute, the other fasts and festivals enjoined by the English Church, have never been treated as coming within the category of compulsory holidays. Formerly, courts sat even on Sunday; nor were contracts made on that day considered illegal or void, "till the statute of 29 Charles II. chap. 27, was enacted,—whereby "no person whatever is allowed to do or exercise any worldly labor or work of their callings on the Lord's Day." But this prohibition was never extended, either by statute or usage, to their church fasts, festivals or holidays.<sup>1</sup>

There must be a reasonable time during which, without other clue than the presentation of an order for the goods, the carrier shall be required to search his books to ascertain the disposition of a particular shipment.<sup>2</sup> The carrier is bound to make a delivery of the goods within a reasonable time.<sup>3</sup> What is a "reasonable opportunity" for receiving and removing freight after its arrival, will depend upon the peculiar circumstances of each case,—whether the freight arrived at its destination at the time, etc.<sup>4</sup>

Where goods arrived at eleven o'clock and were unloaded into the carrier's depot between three and four p. m., and were ready for delivery to the consignee by four o'clock, and the depot was closed, as usual, at six p. m., and was destroyed, with the goods, by fire, before the next business day, the finding of the jury that a reasonable time had not elapsed within which the consignee could remove the goods and charging their loss upon the carrier,

<sup>1</sup> *Figgins v. Willie*, 2 W. Bl. 1186; *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>2</sup> *Woodward v. Illinois Cent. R. Co.* 33 Ill. App. 433.

<sup>3</sup> *Cope v. Cordova*, 1 Rawle, 203; *Chickering v. Fowler*, 4 Pick. 371; *Ostrander v. Brown*, 15 Johns. 39, 8 Am. Dec. 211; *Pickett v. Downer*, 4 Vt. 21; *Mayell v. Potter*, 2 Johns. Cas. 371; *Stephenson v. Hart*, 4 Bing. 476; *Kohn v. Pickard*, 3 La. 225, 23 Am. Dec. 453; *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 332.

<sup>4</sup> *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 468.

was sustained.<sup>1</sup> Where the consignee's cartman called for the goods on Saturday afternoon and was told that it would be late when goods arrived, and he need not call again before Monday, and the goods arrived about sundown—of which the carrier was advised, his place of business being nearly a mile distant—but he did not call for them, and the goods were burned with the warehouse,—the carrier was held liable.<sup>2</sup>

In the absence of special contract, local custom, or usage of trade on the subject-matter will control as an implied term in the contract.<sup>3</sup> The construction and validity of a contract are to be governed by the law of the place where the contract is made and where it is to be performed.<sup>4</sup> The principle has been directly applied in many cases to contracts made by common carriers.<sup>5</sup> In England the same result has been reached.<sup>6</sup> A contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, must be governed by the law of that country unless the parties, when entering into the contract, clearly manifested a mutual intention that it shall be governed by the law of some other coun-

<sup>1</sup> *Parker v. Milwaukee & St. P. R. Co.* 30 Wis. 689.

<sup>2</sup> *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773. See *Moses v. Boston & M. R. Co.* 32 N. H. 523, 64 Am. Dec. 381. But, see also, *Frances v. Dubuque & S. C. R. Co.* 25 Iowa, 60, 95 Am. Dec. 769.

<sup>3</sup> *Wardell v. Mourillyan*, 2 Esp. 693; *Gatliffe v. Bourne*, 4 Bing. N. C. 314-329; *Cope v. Cordova*, 1 Rawle, 203; *Ostrander v. Brown*, 15 Johns. 39; *Gibson v. Culver*, 17 Wend. 305, 311, 31 Am. Dec. 297; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389; *Cutley v. Wintringham*, Peake, 150; *Golden v. Manning*, 3 Willes, 420.

<sup>4</sup> Story, Conf. L. § 242; Addison, Cont. § 195; Wharton, Conf. L. §§ 471 et seq.; *Miller v. Tiffany*, 68 U. S. 1 Wall. 310, 17 L. ed. 543; *Scudder v. Union Nat. Bank*, 91 U. S. 406, 23 L. ed. 245.

<sup>5</sup> *Hazel v. Chicago, M. & St. P. R. Co.* 82 Iowa, 477; *Brown v. Camden & A. R. Co.* 83 Pa. 316; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529, 56 Am. Rep. 235; *Fonseca v. Cunard S.S. Co.* 12 L. R. A. 340, 153 Mass. 553; *Knockton v. Erie R. Co.* 19 Ohio St. 260, 2 Am. Rep. 395; *Talbott v. Merchants Despatch Transp. Co.* 41 Iowa, 247, 20 Am. Rep. 589; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Hale v. New Jersey Steam Nav. Co.* 15 Conn. 539, 39 Am. Dec. 398; *Pennsylvania Co. v. Fairchild*, 69 Ill. 260; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Cantu v. Bennett*, 39 Tex. 302; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589. See also *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283; *McDaniel v. Chicago & N. W. R. Co.* 24 Iowa, 412.

<sup>6</sup> *Peninsular & O. Steam Nav. Co. v. Shand*, 11 Jur. N. S. 771; *Jacobs v. Credit Lyonnais*, L. R. 12 Q. B. Div. 589, 53 L. J. Q. B. N. S. 156; *Re Missouri S.S. Co.* L. R. 42 Ch. Div. 321.

try. The fact that the goods were to be delivered at Liverpool, and the freight and primage were payable there in sterling currency does not make the contract an English contract, or refer to the English law the question of the liability of the carrier for the negligence of the master and crew in the course of the voyage. Each of the bills of lading in such a case, is an American and not an English contract, and so far as concerns the obligation to carry the goods in safety, is to be governed by the American law, and not by the law, municipal or maritime, of any other country. That the vessel was stranded off the coast of Great Britain was immaterial.<sup>1</sup>

It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance, that the contract was to be entirely performed elsewhere, or that the subject-matter is in movable property situated in another country and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general ones, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract.<sup>2</sup> But, where the vessel and her owners were English, and the bill of lading was made in the English form and the goods were destined for England and the contract was valid only under the English law, these facts were held conclusive proof that the contracting parties had the English law in view, although the shipment was made from Boston.<sup>3</sup>

<sup>1</sup> *Liverpool & W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788.

<sup>2</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. 122, 6 Best & S. 133; *Canter v. Bennett*, 39 Tex. 303; *Talbott v. Merchants Despatch Transp. Co.* 41 Iowa, 247, 20 Am. Rep. 589; *Brooke v. New York, L. E. & W. R. Co.* 108 Pa. 529, 56 Am. Rep. 235; *Dyke v. Erie R. Co.* 45 N. Y. 113, 6 Am. Rep. 43.

<sup>3</sup> *Re Missouri S.S. Co.* L. R. 42 Ch. Div. 321. See also *Brown v. Camden & A. R. Co.* 83 Pa. 316.

A contract of carriage exempting the carrier from liability for negligence, which is valid under the law of the state where it is made, and is to be wholly performed, and in which the alleged breach occurs, is enforceable in another state, although such a contract would be invalid under the law of the latter.<sup>1</sup>

The Supreme Court of the United States follows the decisions of the state courts only to a certain extent. Where private rights are determined by common law rules alone, that court does not feel bound by the decisions of the state courts.<sup>2</sup> Decisions involving only general principles of equity, and not controlled by local law or usage, are not binding on that court.<sup>3</sup> United States courts are not controlled by decisions of state courts on questions of general commercial law.<sup>4</sup> Upon a New York contract exempting a carrier from liability for negligence, the circuit court of the United States for the New York district is not bound to hold the exemption valid because of the decisions of the New York courts.<sup>5</sup>

The Federal courts having, as is said in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, and *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, "equal and co-ordinate jurisdiction with the courts of the state," their competence to pass independently upon general questions of commercial law may, upon this ground, with some show of reason, be sustained. But the courts of other states have no such "equal and co-ordinate jurisdiction." The obligation of comity as to the unwritten law in the contract of carriers is upheld in *Milwaukee & St. P. R. Co. v. Smith*, 74 Ill. 197. But the court of another state, where an action is pending, may adhere to its own rules and disregard the decisions of the state which overrule a great principle. The decisions of a state court should not be followed to such an

<sup>1</sup> *Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

<sup>2</sup> *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298.

<sup>3</sup> *Russell v. Southard*, 53 U. S. 12 How. 139, 13 L. ed. 927; *Neves v. Scott*, 54 U. S. 13 How. 268, 14 L. ed. 140.

<sup>4</sup> *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Oates v. First Nat. Bank of Montgomery*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank of the Republic*, 102 U. S. 14, 26 L. ed. 61.

<sup>5</sup> *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

extent as to make a sacrifice of truth, justice and law.<sup>1</sup> No state will enforce a contract injurious to good morals or public safety.<sup>2</sup> In an action for loss of baggage delivered at Scranton, Pa., to be transported to New York City, the New York court held that the contract was not controlled by a statute of Pennsylvania limiting and defining the liability of railroad corporations for baggage; but that the rights of the parties were to be determined by the laws of the state where the delivery was to be made.<sup>3</sup>

§ 136. *Delivery to Proper Person—Bill of Lading—Draft.* See ante §§ 25, 29-31.

The responsibility of a common carrier continues till there has been a due delivery by him or a discharge of himself from the custody of the goods in his character as common carrier.<sup>4</sup> The consignee named in a bill of lading is the presumptive owner of the goods, and must be treated by the carrier as absolute owner until notice to the contrary; and delivery to him without such notice will discharge the carrier.<sup>5</sup> The carrier should ascertain whether a bill of lading was delivered to the shipper, and if so, he should retain the property until demanded by one claiming under that title.<sup>6</sup>

Where a statute forbids a common carrier to deliver goods transported, unless the bill of lading thereof is delivered up and canceled,—a delivery to the consignee will not protect the carrier from the demand made for the goods, by one to whom the bills

<sup>1</sup> *Faulkner v. Hart*, 82 N. Y. 416, 37 Am. Rep. 574; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 175, 205, 17 L. ed. 520, 525; *Olcott v. Fond du Lac County Suprs.* 83 U. S. 16 Wall. 678, 21 L. ed. 382.

<sup>2</sup> Wharton, Conf. L. p. 388, § 490; Story, Conf. L. p. 371, § 244; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Hope v. Hope*, 8 DeG., M. & G. 731; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 276, 26 L. ed. 545; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308.

<sup>3</sup> *Curtis v. Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271.

<sup>4</sup> *Garside v. Trent & M. Nav. Proprs.* 4 T. R. 581; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389.

<sup>5</sup> *Hartwell v. Louisville & N. R. Co.* 15 Ky. L. Rep. 778.

<sup>6</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579; *City Bank v. Rome, W. & O. R. Co.* 44 N. Y. 136; *Howard v. Shepherd*, 9 C. B. 296; *Tindal v. Taylor*, 4 El. & Bl. 219; *First Nat. Bank of Peoria v. Northern R. Co.* 58 N. H. 203.

of lading have been assigned and who produces them.<sup>1</sup> But unless authorized by statute, a railway company cannot, as a condition precedent to the delivery of freight to the consignee and owner, exact from him a delivery to it of the bill of lading; nor can it require him to give an indemnity bond upon his failure or refusal to surrender up the bill of lading.<sup>2</sup> Guaranty executed to a carrier by consignees or third parties, which might be construed to enable the carrier, in consideration of freight delivery before settlement of transportation charges, to exact for services rendered in moving and delivering the freight whatever it chooses to demand, cannot be used by the carrier to force payment of charges in excess of those it would be entitled to collect or receive if previous freight delivery had not been made.<sup>3</sup> A railroad company with knowledge of the fact, is not exempt from liability for damages for failure to deliver freight, for the reason that the freight is to be used for an illegal purpose at the point of destination, unless that illegal purpose was the consideration of the contract.<sup>4</sup>

Where the information which the carrier procured as to the consignee was of a doubtful nature, so far as the transfer sheet to it was concerned, it was a negligent act of the carrier to deliver the goods to persons named in the transfer sheet, who did not plainly appear to be the consignees. A direction in a bill of lading to notify certain persons, is notice that they are not consignees, and does not qualify the carrier's duty to deliver to the consignee.<sup>5</sup> Where no one is named as consignee in a bill of lading, no delivery should be made to any one who does not produce it.<sup>6</sup> The fact that an indorser of a bill of lading was unknown does not excuse a misdelivery.<sup>7</sup> A carrier which, in violation of a notification by the consignor—to whom it delivered the bill of

<sup>1</sup> *Colgate v. Pennsylvania Co.* 102 N. Y. 120.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) 25 S. W. 435, but see same case, 26 S. W. 745.

<sup>3</sup> *Phelps v. Texas & P. R. Co.* 4 Inters. Com. Rep. 363.

<sup>4</sup> *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, 110 N. C. 338.

<sup>5</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287.

<sup>6</sup> *Furman v. Union Pac. R. Co.* *supra*.

<sup>7</sup> *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804, 7 Blatchf. 226, 3 Ben. 279.

lading of goods shipped—not to deliver the goods to the consignees except upon production of the bill of lading and payment of the draft drawn upon them by the consignor, delivers the goods to the consignees without production of the bill of lading and before payment of the draft, is liable to the consignor.<sup>1</sup> Where a bill of lading is attached to a draft upon the consignee, the carrier who delivers the goods while *in transitu* to the shipper is liable to the consignee who has duly taken up the draft.<sup>2</sup> An indorsement by the shipper of receipts taken on shipment of cattle, will give the indorsee the right to their possession, and if necessary, to sell them for payment of drafts taken by him against the shipper, and the custom of the company of delivering the cattle, without requiring the production of the bill of lading or authority of the shipper, does not relieve it from liability for cattle wrongfully delivered.<sup>3</sup>

If a carrier gives a bill of lading which makes the goods deliverable upon the order of the consignor, delivers them without production of the bill, it does so at its peril. A secret agreement between the consignor and consignee that the goods are to be delivered by the carrier without the production of the bills of lading, by which goods are deliverable upon the order of the consignor, is fraudulent as to one discounting drafts against the consignment, and void.<sup>4</sup> The filing of a note or other contract evidencing a conditional sale, as provided by Minn. Gen. Stat. 1878, chap. 39, § 15, does not constitute notice to a carrier to whom it is delivered for a consignee, that title to the property is retained by the consignor; and it may settle with the consignee for loss or destruction of the property, relying upon the legal presumption that title vests in the consignee upon delivery to the carrier.<sup>5</sup> A carrier may be justified in delivering goods to a person named by the consignor's agent as well as by the consignee, although orders had previously been given by the consignor not

<sup>1</sup> *Hartwell v. Louisville & N. R. Co.* 15 Ky. L. Rep. 778.

<sup>2</sup> *Wells, Fargo & Co. v. Oregon R. & Nav. Co.* 32 Fed. Rep. 51.

<sup>3</sup> *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287.

<sup>4</sup> *Chester Nat. Bank v. Atlanta & C. A. L. R. Co.* 25 S. C. 216.

<sup>5</sup> *Dyer v. Great Northern R. Co.* 51 Minn. 345.



to deliver to anyone except the agent, where the reason for such orders was a dispute as to the liability of the consignee in whose name the goods were shipped to another person.<sup>1</sup>

A delivered to a railroad company at a station on its road a quantity of flour owned by him, which was there placed on the cars of said company, to be shipped to B at another station on said road, in pursuance of a contract between A and B for the sale of said flour by the former to the latter, to be so delivered at cars at said former station, and to be paid for on receipt of the bills of lading. At the time of the delivery B was insolvent, and A received from the station agent of said company, authorized to receive and forward freights and furnished with blank bills of lading at the station where the flour was so delivered, a bill of lading, containing, besides the usual clauses, a provision, inserted at the request of A that said flour should be delivered to B upon the presentation of a duplicate of said bill of lading, and received also a second bill of lading in usual form marked "duplicate" across the face thereof, in which the clause in relation to presentation of duplicate was omitted by mistake of the agent. A made his draft on B for the purchase money of the flour, and attached said duplicate thereto, and negotiated said draft to C, who, in good faith, paid value therefor, knowing the form, character and contents of said original bill of lading, which was then indorsed and delivered by A to C as collateral security for the payment of said draft; and C deposited said draft, with said duplicate attached, at the bank at which it was made payable, and the cashier of said bank presented the same to B before the delivery of the flour to him, who failed and refused to pay said draft or any part of it, but accepted it by indorsement across the face thereof; and, three days of grace having been granted, said draft was protested for nonpayment, and the next day C produced said original bill of lading and said duplicate at the office of the said railroad company, at the station to which said flour was to be shipped as aforesaid, and demanded said flour thereon; but said company failed and refused to deliver the flour, having delivered it to B who was insolvent, and so continued to be, and now had shipped

<sup>1</sup> *Brusher v. Denver & R. G. R. Co.* 12 Colo. 384.

the flour out of the state. It was here held that the railroad company was liable to C for the loss occasioned him by the delivery of the flour to B.<sup>1</sup>

In a late case<sup>2</sup> the facts were that one Evans, ordered of a canning company certain goods. Not being acquainted with Evans, and not wishing to sell the goods on credit, it delivered them, marked and consigned to itself at Pueblo, to a railway company at Elgin, Iowa. From that company the canning company took two receipts or bills of lading which were in fact duplicates, but neither showed that another had been issued. The canning company drew a draft on Evans, through a bank in Pueblo, for the price of the goods, and sent to the bank an order on defendant to deliver the goods to Evans. The draft and order were sent together to the bank with instructions to deliver the order to Evans upon payment by him of the draft. At the same time the canning company sent to Evans one of the bills of lading, instructing him that the goods had been shipped, and that he was to pay the draft and obtain the order. The bill of lading sent to Evans was not signed or indorsed by the canning company. In due time the goods were transferred by the railway company which first received them, to defendant, and were by it transferred to Pueblo. Evans never paid the draft or obtained the order, but within twenty-four hours after the arrival of the goods in Pueblo he presented the bill of lading which he had received, to defendant, and without other authority obtained the goods. At that time Evans was insolvent, but defendant had no knowledge of that fact, nor that the goods had not been paid for, nor that a draft and order had been sent or instructions given in regard to the goods, but delivered them in good faith. The canning company commenced an action to recover of the carrier the value of the goods in question.

The carrier in its defense insists that it was not in fault in delivering the goods to Evans for the reason that the delivery to him of the bill of lading was in effect an assignment of the goods and invested him with a right to demand and receive them. It refers

<sup>1</sup> *McEwen v. Jeffersonville & I. R. Co.* 23 Ind. 368, 5 Am. Rep. 216.

<sup>2</sup> *Weyand v. Atchison, T. & S. F. R. Co.* 1 L. R. A. 650, 75 Iowa, 573.

to a case in New York.<sup>1</sup> An examination of that case and of the cases therein cited will show that what the court really decided was that a delivery of the forwarder's receipt without assignment, but with intent that the title to the goods for which it was given or an interest therein should be thereby transferred, would be effectual to accomplish the transfer intended. Other authorities are to the same effect. In this case it was the intention of the canning company to retain the title and right of possession in itself until the price of the goods should be paid. The bill of lading required the delivery of the goods to the consignor. It did not provide for delivery to bearer or order, but to the Elgin Canning Company. Therefore it is clear that the forwarding of the bill of lading to Evans with directions to pay the draft and obtain the order for the goods did not invest him with any right to the goods as against the consignor. But it is said that defendant was justified in delivering the goods to Evans because of his possession of the bill of lading.<sup>2</sup> It is true that statements were made in some, if not all, of those cases which, considered apart from the connection in which they are found, might seem to sustain the claim; but when they are considered in connection with the facts of the cases where found, and the general conclusions of the court which made them, it appears they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties.

In *Fearon v. Bowers*, reported in 1 Smith, Lead. Cas. \*864, a well considered case, the consignor had sent two bills of lading, one of which was indorsed to one person and the other to another, and the court held that a delivery might be made to the holder of either bill. That case has but little relation to the principle involved in this. The carrier insists that the bill of lading is like a promissory note, in that possession is prima facie evidence of ownership; but it does not seem that such is the case. A bill of

<sup>1</sup> *Merchants Bank of Canada v. Union R. & Transp. Co.* 69 N. Y. 374.

<sup>2</sup> The cases of *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. \*848, with annotations; *Dows v. Greene*, 24 N. Y. 638; *Allen v. Williams*, 12 Pick. 297, and others, are cited in support of this claim.

lading is a non-negotiable instrument.<sup>1</sup> The following language is pertinent: "Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. . . . They are in commerce a very different thing from bills of exchange and promissory notes, answering a different purpose and performing a different function." Also: "It is not a representative of money, used for transmission of money or for the payment of debts or for purchases. It does not pass from hand to hand, as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of those goods; but if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen."<sup>2</sup>

In 2 Parsons on Contracts, 292, it is said: "The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill—it may be indorsed in blank, or to the agent, or to the party ordering the goods—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, beyond all question, the right and power of retaining the goods until the price for them is paid or secured to him."

This is not only in point, but seems to be sound in principle. The fact that Evans presented the bill of lading in this case was not sufficient to overcome the presumption which the terms of the bill raised, that the consignee was the owner of the goods. That such is the presumption is well established.<sup>3</sup> The contract with the canning company required the defendant to deliver the goods

<sup>1</sup> *Garden Grove Bank v. Humeston & S. R. Co.* 67 Iowa, 534.

<sup>2</sup> *Shaw v. Merchants Nat. Bank*, 101 U. S. 557, 25 L. ed. 892.

<sup>3</sup> *Congar v. Galena & C. U. R. Co.* 17 Wis. 485; *Krulder v. Ellison*, 47 N. Y. 37, 7 Am. Rep. 402; *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58; *Alderman v. Eastern R. Co.* 115 Mass. 234. See also *Tuttle v. Becker*, 47 Iowa, 486; 1 Benj. Sales, §§ 577, 579; 2 Am. & Eng. Enc. Law, 242, 243.

to the consignor. The unindorsed bill of lading presented by Evans was evidence that the contract was still in force, and that the canning company was then the owner of the goods. The delivery to Evans was not authorized, and was made by defendant at its own risk. But it is said that the canning company clothed Evans with the apparent right to demand the goods, and that since "one of two innocent parties must suffer a loss from the wrong of another, the loss should fall upon the party who put it in the power of that other to perpetrate the wrong." This case does not fall within that rule, for as we have seen, the possession of the bill of lading, without indorsement or other evidence of assignment, did not vest Evans with any apparent right to the property. The loss resulted from the negligence of defendant in not insisting upon proper evidence of an assignment before it surrendered the goods.

It is insisted by the carrier that the delivery to Evans was made in accordance with the custom at Pueblo, and that the contract of shipment must have been made with reference to that custom. The superior court found that by a local custom at Pueblo goods shipped over railway lines to that place were delivered to the persons who held the bills of lading, but that the custom was not general, and plaintiff had no knowledge of it. The contract of shipment required defendant to deliver the goods to the canning company; and we question the right of defendant to vary this by showing a custom in conflict with it. The contract was not ambiguous, and required no explanation. But where a custom may be shown it must appear that it was so general that the parties to the contract will be presumed to have contracted with reference to it.<sup>1</sup>

Thus a custom at the place of consignment, to deliver goods consigned to the purchaser directly, without the bill of lading being shown, will relieve the carrier, although a draft was attached to the bill of lading, if held by a resident of the place of delivery.<sup>2</sup> The court not only found that the custom pleaded

<sup>1</sup> *Couch v. Watson Coal Co.* 46 Iowa, 20; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 422; *Fay v. Alliance Ins. Co.* 16 Gray, 461; *Wilson v. Bauman*, 80 Ill. 494; 2 Greenl. Ev. § 251.

<sup>2</sup> *Forbes v. Boston & L. R. Co.* 133 Mass. 154.

was local, but that plaintiff had no knowledge of it.<sup>1</sup> How the knowledge of plaintiff would affect the contract does not appear; but knowledge on the part of the canning company when the shipping receipt was taken is not pleaded nor is it shown. Therefore this defense is not maintained.<sup>2</sup> Where one, personally acting as master and believed to be such by the consignor, signs a bill of lading which the consignor indorsed and sent to the consignee, and procured a policy of insurance on the goods payable to the consignee, this fact will warrant a finding of delivery to the consignee, who has made advances on the goods,—although the bill of lading was in fact signed by one who had no authority.<sup>3</sup>

### § 137. *Notice to Consignee of Arrival of Goods.*

A carrier is only bound to deliver goods at its usual freight depot, not at consignee's place of business, and is not always held bound to notify consignee.<sup>4</sup> No notice to a consignee of the arrival of goods is necessary, to relieve the carrier from liability except as warehouseman, after a reasonable time in some courts.<sup>5</sup>

In other courts, it has been held that while generally, it is the duty of the carrier to give notice of the arrival of goods, to the consignee, yet the uniform usage or custom to leave them at a particular place of deposit, where the carrier is accustomed to stop at the risk of the owner of the goods, without giving him any notice, will exonerate the carrier.<sup>6</sup> In New York and some other states, the rule requires that the carrier should ascertain whether a bill of lading was delivered to the shipper, and if so, should retain the property till demanded by one claiming under that title. It is the duty of the carrier to notify the consignee of

<sup>1</sup> *Weyand v. Atchison, T. & S. F. R. Co.* 1 L.R. A. 650, 75 Iowa, 573.

<sup>2</sup> *Walls v. Bailey*, 49 N. Y. 473, 10 Am. Rep. 407; *Higgins v. Moore*, 34 N. Y. 425; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287; *Clarke's Browne*, Usages & Customs, 134, note 4.

<sup>3</sup> *Prince v. Boston & L. R. Co.* 101 Mass. 542, 100 Am. Dec. 129.

<sup>4</sup> *Buddy v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 206.

<sup>5</sup> *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

<sup>6</sup> *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297.

the arrival of the goods.<sup>1</sup> A carrier is not only liable while property may be in the course of its transit or carriage, but it continues liable for such a reasonable period of time as will enable the consignee after notice of the arrival of the goods, with reasonable diligence to effect their removal.<sup>2</sup> A carrier's liability in Ohio courts continues in the absence of any statutory provision on the subject, after the goods have reached their destination until the consignee has been notified of their arrival and has had reasonable time to remove them.<sup>3</sup> The liability of a common carrier of freight as such ceases in Illinois upon the arrival of the cars at the place of destination, and the notification of the consignee of their arrival, in accordance with instructions given to such carrier.<sup>4</sup>

Where, upon the arrival of goods, they are placed upon the depot platform—the usual place of delivery—and the consignee is notified of their arrival and pays the freight, the liability of the company as a carrier is at an end.<sup>5</sup> A railroad company which deposits a carload of wheat at a place where it has been agreed between it and the consignees all carload consignments shall be placed, and notifies the consignees of its arrival and that it has been so placed, is exonerated from its liability as a common carrier for its destruction by fire without negligence on its part, whether the place where the wheat was left was reasonably safe or not.<sup>6</sup> The consignee of goods shipped by a carrier is entitled to a reasonable time within usual business hours to inspect the goods to ascertain whether they correspond with the invoice, and to receive and remove them; and during that time the carrier's liability remains undischarged.<sup>7</sup> Notice of the arrival of goods, given by the carrier to the consignee after dark, during one of the winter months, will not require him to call for them before business hours on the following day.<sup>8</sup> Failure of a common car-

<sup>1</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579.

<sup>2</sup> *Dunham v. Boston & A. R. Co.* 46 Hun, 245.

<sup>3</sup> *Lake Erie & W. R. Co. v. Hatch*, 6 Ohio C. C. 230.

<sup>4</sup> *Gregg v. Illinois Cent. R. Co.* 147 Ill. 550, affirming 47 Ill. App. 590.

<sup>5</sup> *New Albany & S. R. Co. v. Campbell*, 12 Ind. 55.

<sup>6</sup> *Pindell v. St. Louis & H. R. Co.* 41 Mo. App. 84.

<sup>7</sup> *McNeal v. Braun*, 53 N. J. L. 617.

<sup>8</sup> *Lake Erie & W. R. Co. v. Hatch*, 6 Ohio C. C. 230.

rier to notify the consignor of the failure of the consignee to take goods sent him does not render the carrier liable for any damages resulting therefrom, where the consignor knows of such failure and makes other arrangements with the consignee.<sup>1</sup> Where the carrier undertakes to hold goods until called for, his liability as a carrier will continue for a reasonable time under his liability as carrier, after which he will only be held as a warehouseman.<sup>2</sup>

§ 138. *Collections by Carrier—Sale of Goods.* See ante, §§ 1a and 32.

Where a master is employed in the river transportation business and by usage it becomes his duty to sell, as well as to carry the money received from the sale; such proceeds, while in the possession of the carrier, subject him to the same liability as a common carrier of goods.<sup>3</sup> The carrier may also take upon itself the duty of collecting the price of the goods—in which case it assumes to act as agent of the shipper, and is bound under the law of agency.<sup>4</sup> A reasonable time must be permitted for inspection of the goods, and if the carrier is to collect their cost a reasonable time must be allowed for the purchaser to obtain the money, and a refusal of such time for such declared purpose, may render the carrier liable. And it has been held that even for freight charges while the carrier may relieve himself of his responsibility as carrier, by a demand and tender, he must hold them a reasonable time, upon request, as warehouseman.<sup>5</sup>

A carrier's contract to collect the money on goods shipped, before delivering to the consignee, is not broken, in the absence of express prohibition, by allowing the consignee to inspect the

<sup>1</sup> *Gregg v. Illinois Cent. R. Co.* 147 Ill. 550, affirming 47 Ill. App. 590.

<sup>2</sup> *Chapman v. Great Western R. Co.* 42 L. T. N. S. 252; *Bickford v. Metropolitan SS. Co.* 109 Mass. 151.

<sup>3</sup> *Kemp v. Coughtry*, 11 Johns. 107.

<sup>4</sup> *Meyer v. Lemcke*, 31 Ind. 208; *Old Colong R. Co. v. Wilder*, 137 Mass. 536; *Murray v. Warner*, 55 N. H. 546, 20 Am. Rep. 227; *Union R. & Transp. Co. v. Riegel*, 73 Pa. 72; *American Exp. Co. v. Lesem*, 39 Ill. 312; *Great Western R. Co. v. Crouch*, 3 Hurlst. & N. 183.

<sup>5</sup> *Great Western R. Co. v. Crouch*, *supra*; *Herrick v. Gallagher*, 60 Barb. 566; *Lyons v. Hill*, 46 N. H. 49; *Marshall v. American Exp. Co.* 7 Wis. 1, 73 Am. Dec. 381.



goods before acceptance; and the consignee's refusal upon inspection to accept goods, will not render the carrier liable to the shipper.<sup>1</sup> To an action against a carrier for delivery, without payment of the price, of goods alleged to have been deliverable, by the bills of lading, to the order of plaintiff, who indorsed and delivered the bills to the carrier, with the agreement that upon payment of the price they were to be delivered to a third person,—it is a good defense that the agreement was made with the carrier's agent, and that he acted beyond his authority and as plaintiff's agent in delivering the goods, and not as the carrier's agent.<sup>2</sup>

### § 139. *Delivery to Wrong Person—Conversion.*

A carrier delivering the goods to other than the holder of the bill of lading, is defenseless.<sup>3</sup> By issuing bills of lading stipulating for a delivery to order, a carrier becomes bound to deliver the goods to no one who has not the order of the shipper, and it is not excused for the delivery to the wrong person, by the plea that the indorsee of the bills of lading was unknown and that the notice of the arrival of the goods could not be given. Diligent inquiry for the consignee, at least, is a duty. Want of notice is excused when the consignee is unknown or is absent, or cannot be found after diligent search. And, if after inquiry, the consignee or indorsee of the bill of lading for delivery to order, cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of, their owner. He may thus relieve himself of the carrier's responsibility. He has no right under any circumstances to deliver to a stranger.<sup>4</sup> A carrier is not justified in making delivery of a shipment except in accordance with the bill of lading.<sup>5</sup>

A conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to

<sup>1</sup> *Aaron v. Adams Exp. Co.* 27 Ohio L. J. 183.

<sup>2</sup> *Cox v. Columbus & W. R. Co.* 91 Ala. 392.

<sup>3</sup> *Douc v. National Exch. Bank*, 91 U. S. 618, 23 L. ed. 214; *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 568.

<sup>4</sup> *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287.

<sup>5</sup> *Pennsylvania R. Co. v. Stern*, 119 Pa. 24.

another to the alteration of their condition or the exclusion of the owner's rights.<sup>1</sup> A carrier who receives goods to deliver to a person designated by the shipper becomes liable as for a conversion the moment he makes an unauthorized delivery to another than the person designated; and upon his admitting such misdelivery, but insisting that it is rightful, no demand is necessary before suit brought.<sup>2</sup> The risk of a wrong delivery rests upon the carrier,<sup>3</sup> nor can it excuse itself from liability for a wrongful delivery of goods on the ground that such delivery was made through a mistake.<sup>4</sup> A carrier which delivers to a shipper goods of which the bill of lading has been transferred to a bona fide holder by the consignee, to whom it was delivered by the shipper, is liable to the holder for a conversion of the goods.<sup>5</sup>

A common carrier is liable, in an action of trover, for the value of goods delivered to a person other than the one described in the bill of lading, upon his presentation of it without indorsement, notwithstanding the existence of a custom to deliver goods to anyone in possession of the bill of lading.<sup>6</sup> A consignor of goods may recover their value less freight and storage, from a carrier which, upon the refusal of the consignee to accept them, has sold them at private sale without notice to either consignor or consignee, although the latter authorized the sale.<sup>7</sup> A wrongful delivery of goods by the carrier is treated at common law as a conversion of the property.<sup>8</sup> A carrier is liable in trover for goods delivered to the consignee in violation of instructions from the shipper not to deliver them without a bill of lading.<sup>9</sup> It is a conversion, rendering the carrier liable for the goods where it delivers them to the wrong person, and fails to deliver to the

<sup>1</sup> *Stickney v. Munroe*, 44 Me. 197; *Gilman v. Hill*, 36 N. H. 311.

<sup>2</sup> *Fulton v. Lydecker*, 41 N. Y. S. R. 457.

<sup>3</sup> *Wernwag v. Philadelphia, W. & B. R. Co.* 117 Pa. 46.

<sup>4</sup> *Clement v. New York Cent. & H. R. R. Co.* 30 N. Y. S. R. 713.

<sup>5</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

<sup>6</sup> *Louisville & N. R. Co. v. Barkhouse*, 100 Ala. 543.

<sup>7</sup> *Cottingham v. Grand Trunk R. Co.* 7 Mont. L. Rep. (Super. Ct.) 385.

<sup>8</sup> *Dereaux v. Barclay*, 2 Barn. & Ald. 702; *Stephens v. Elwoall*, 4 Maule & S. 259; *Duff v. Budd*, 3 Brod. & B. 177; *Youl v. Harbottle, Peake*, 68.

<sup>9</sup> *Foggan v. Lake Shore & M. S. R. Co.* 40 N. Y. S. R. 718.

owner on demand.<sup>1</sup> A carrier is guilty of conversion where it negligently delivers goods to a person not entitled to them,<sup>2</sup> and thereafter contracts with him to sell them and hold the proceeds for its account.<sup>3</sup>

No subsequent actual "delivery" will relieve from liability for delivering goods to a person not then entitled to them.<sup>4</sup> But it has been held that if the property came lawfully into defendant's possession, and the conversion was only technical, and the property is in the same condition, the plaintiff will be compelled to take it back in mitigation of damages.<sup>5</sup>

A carrier desiring to limit its responsibility on bills of lading to a delivery to the named consignee alone, must stamp its bills "non-negotiable." No demand is necessary before suit against a carrier for failure to deliver freight, where it has already delivered it to one not entitled thereto.<sup>7</sup> If there has been a conversion of them by the carrier, and the consignee has not thereafter accepted them, he is entitled to recover the value of the goods at the time they should have been delivered to him. Such demand and refusal may afford satisfactory evidence of a conversion, but is not the only evidence by which it may be proven. Any wrongful exercise of dominion over chattels to the exclusion of the rights of the owner, or withholding of them from his possession under a claim inconsistent with his rights, constitutes a conversion.<sup>6</sup> If, through the carrier's negligence, after goods have been stored they are delivered to the wrong person, the carrier will be liable to the owner, as for the conversion of the goods.<sup>9</sup>

Where the consignor ships goods to himself and the invoice shows they were to be delivered only upon the production of the bill of

<sup>1</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579.

<sup>2</sup> *Viner v. New York, A. G. & W. S.S. Co.* 50 N. Y. 24.

<sup>3</sup> *Erie Dispatch v. Johnson*, 87 Tenn. 490.

<sup>4</sup> *Nickey v. St. Louis, I. M. & S. R. Co.* 35 Mo. App. 79.

<sup>5</sup> *Earl v. Holderness*, 4 Bing. 462; *Churchill v. Welsh*, 47 Wis. 39; *Bucklin v. Beals*, 38 Vt. 653; *Rutland & W. R. Co. v. Bank of Middlebury*, 32 Vt. 639; *Tracey v. Good*, 1 Pa. L. J. 472; *Cook v. Loomis*, 26 Conn. 483.

<sup>6</sup> *Bank of Batavia v. New York, L. E. & W. R. Co.* 106 N. Y. 195.

<sup>7</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

<sup>8</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489.

<sup>9</sup> *Merchants Despatch & T. Co. v. Merriam*, 111 Ind. 5.

lading, the carrier is liable for delivering them to a third party (the holder of the invoice) without compliance with the terms.<sup>1</sup> That the carrier had, on prior occasions, delivered the goods to such third person without the production of the bill of lading, of which fact the shipper had no knowledge, will not relieve it from such liability.<sup>2</sup> Where parties made a contract in their own names with a carrier for the delivery of goods to themselves, any delivery by the carrier to a purchaser, before the shippers have parted with the right of possession, is at the carrier's own risk; and it does not devolve upon the carrier to decide whether by the contract of purchase the purchaser was entitled to the delivery, or not.<sup>3</sup> The carrier must deliver to the actual party designated by the terms of shipment, or to his order at the place of destination; and where it delivers them to one not entitled to receive them it is accountable.<sup>4</sup> One who receives goods from a person in actual wrongful possession and restores the goods to such person is not liable to the owner for conversion,<sup>5</sup> even though the goods were received from and restored to the wrongful possession with notice of the claim of the true owner.<sup>6</sup> A carrier is not guilty of conversion where he in good faith takes goods from the possession of the owner, by direction of another having the apparent control of the goods, and the present capacity of investing himself with actual possession, and delivers them to such other person in another place.

The defendant, Armstead, who was a job teamster, removed the goods alleged to have been by him converted, from a room in Whittier's house to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although

<sup>1</sup> *Furman v. Union Pac. R. Co.* 106 N. Y. 579; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287.

<sup>2</sup> *Pennsylvania R. Co. v. Stern*, 119 Pa. 24.

<sup>3</sup> *Wolfe v. Missouri Pac. R. Co.* 3 L. R. A. 539, 97 Mo. 473.

<sup>4</sup> *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 31 L. ed. 287.

<sup>5</sup> *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6; *National Mercantile Bank v. Rymill*, 44 L. T. N. S. 767; *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289.

<sup>6</sup> *Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84; *Nelson v. Iverson*, 17 Ala. 216.

the goods were in the house of Whittier, they were in a room hired by the plaintiff, Gurley, from him. The contract between them was one for rent, and not of storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith without any intention of depriving the rightful owner of her property and in ignorance of the fact that plaintiff was such owner, neither asserting title in himself, nor denying title to any other, nor exercising any act of ownership except by the removal above stated. The legal possession of the goods was under these circumstances undoubtedly in the plaintiff; and as they were in the room hired by her the actual possession was also hers. The apparent control of them was, however, in Whittier—as they were in his house and he had, further, the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened. It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and who restores the goods to such person, is not liable for a conversion by reason of having transported them<sup>1</sup> and this would be so, apparently, even if the goods thus received were restored to the wrongful possessor after notice of the claim of the true owner.<sup>2</sup> The principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of this case. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner, but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession. The defendant was a job teamster and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported with his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time

<sup>1</sup> *Strickland v. Barrett* and *Leonard v. Tidd*, *supra*.

<sup>2</sup> *Loring v. Mulcahy* and *Metcalf v. McLaughlin*, *supra*.

and place with the offer of a reasonable compensation. If he holds himself out as a common carrier he must exercise his calling upon proper request and under proper circumstances.<sup>1</sup> His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. As, if Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well established authority would have been justified in obeying the order and transporting the goods to Whittier at another place, he should not be the less justified where Whittier, in apparent control of the goods in his own house and capable of immediately taking them into his actual custody by entering the room in which they were, through the unlocked door, directs the removal. If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion. Apparent control accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.<sup>2</sup>

Where a carrier by whom goods sold are shipped to be delivered to the vendee upon the payment of the purchase money negligently delivers the goods before such payment, neither the carrier nor the vendor can recover the goods from a bona fide purchaser from the vendee.

A sells goods to B, and ships them by a common carrier, to be delivered to B upon the payment of the purchase money. By the negligence of the carrier B obtains possession of the goods without paying the money, and sells them to C, a bona fide purchaser for value, and without notice. Can A or his bailee, the carrier, recover the goods from C? If the carrier was holding

<sup>1</sup> *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68; *Judson v. Western R. Corp.* 6 Allen, 486, 83 Am. Dec. 646.

<sup>2</sup> *Gurley v. Armstead*, 2 L. R. A. 80, 148 Mass. 267.

the goods only for the payment of its freight charges, its lien could not be enforced against the innocent purchaser. As soon as the goods were delivered to the carrier the right of property passed to the vendee, but the right of possession remained in the vendor until the price was paid.<sup>1</sup> This possession he loses by the negligence of his agent, and he should not be permitted to recover against a defendant, who bought of the vendee in possession, for value, and without notice. Of course, if the vendor could not recover, his negligent agent, the carrier, can have no cause of action. This case falls within the principle declared in *Deardoff v. Foresman*, 24 Ind. 481,—“that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss.”<sup>2</sup> Had this been a conditional sale, an executory contract to sell, an ordinary bailment, or any other transaction which failed to pass the title, the innocent purchaser, however much he may have been misled by the possession and apparent ownership of his vendor, would not be protected.<sup>3</sup>

The case of *Millhiser v. Erdmann*, 103 N. C. 27, does not conflict with this view, as it was there held that by the terms of the agreement the title was not to pass until certain conditions were performed. Here the title passed, and a delivery having been made by the negligence of the vendor's agent, the plainest principles of justice forbid a recovery. As to the innocent purchaser the right of property and the right of possession are united, and his title is therefore complete.<sup>4</sup> But to an action against a carrier for delivery, without payment of the price, of goods alleged to have been deliverable, by the bills of lading, to the order of plaintiff, who indorsed and delivered the bills to the carrier, with the agreement that upon payment of the price they were to be delivered to a third person,—it is a good defense that the agree-

<sup>1</sup> *Ober v. Smith*, 78 N. C. 313; Benjamin, Sales, 260.

<sup>2</sup> This doctrine is recognized in *State v. Lewis*, 73 N. C. 138, 21 Am. Rep. 461; *Vass v. Riddick*, 89 N. C. 6; *State v. Peck*, 53 Me. 284, and in *Hern v. Nichols*, 1 Salk. 289. *Wilmington & W. R. Co. v. Kitchin*, 91 N. C. 39.

<sup>3</sup> *Ballard v. Burgett*, Langd. Cas. Sales, 730, 40 N. Y. 314.

<sup>4</sup> *Norfolk Southern R. Co. v. Barnes*, 5 L. R. A. 611, 104 N. C. 25.

ment was made with the carrier's agent, and that he acted beyond his authority and as plaintiff's agent in delivering the goods, and not as the carrier's agent.<sup>1</sup>

Where goods shipped over a railroad are permitted by the owner to remain at the depot of their destination until the railroad company becomes liable therefor only as warehouseman, and afterwards, on demanding them, the owner is informed by the agent in charge of the depot that the goods have not yet arrived—the failure to deliver the goods on demand will render it liable for conversion,<sup>2</sup> and is such negligence as will render the company liable for their loss by the subsequent burning of the depot.<sup>3</sup> A common carrier's unauthorized delivery of goods may be ratified by the owner or consignee.<sup>4</sup> While the carrier is not bound to accept goods from anyone but the owner, and his legal representative,<sup>5</sup> yet if, without fraud, he receives goods for shipment from one having apparent authority and actual control over them, and delivers them on their arrival to the consignee designated by the shipper, the carrier is not liable.<sup>6</sup>

Where a misdelivery of the goods is caused by the negligence or fraud of the consignor, or by his innocent mistake, the carrier will not be charged with liability,—unless the carrier, being advised of the error, by the use of ordinary diligence could have made the proper delivery.<sup>7</sup>

The carrier must, at his peril, make the delivery to the one

<sup>1</sup> *Cox v. Columbus & W. R. Co.* 91 Ala. 392.

<sup>2</sup> *Louisville & N. R. Co. v. Lawson*, 11 Ky. L. Rep. 38.

<sup>3</sup> *Union Pac. R. Co. v. Moyer*, 40 Kan. 184.

<sup>4</sup> *Converse v. Boston & M. R. Co.* 58 N. H. 521; *Dobbins v. Michigan Cent. R. Co.* 56 Mich. 522; *Cleveland & P. R. Co. v. Sargent*, 19 Ohio St. 438.

<sup>5</sup> *Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33.

<sup>6</sup> *Strickland v. Barrett*, 20 Pick. 415; *Metcalf v. MacLaughlin*, 122 Mass. 84; *Gurley v. Armstead*, 2 L. R. A. 80, 148 Mass. 267; *Buckland v. Adams Exp. Co.* 97 Mass. 124, 93 Am. Dec. 68.

<sup>7</sup> *Dobbins v. Michigan Cent. R. Co.* 56 Mich. 522; *Erie R. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Lake Shore & M. S. R. Co. v. Hodapp*, 83 Pa. 22; *Guillaume v. General Transp. Co.* 100 N. Y. 491; *O'Rourke v. Chicago, B. & Q. R. Co.* 44 Iowa, 526; *Brasher v. Denver & R. G. R. Co.* 12 Colo. 384; *Mahon v. Blake*, 125 Mass. 477; *Wernwag v. Philadelphia, W. & B. R. Co.* 117 Pa. 46; *Southern Exp. Co. v. Kaufman*, 12 Heisk. 161; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164; *Stimson v. Jackson*, 53 N. H. 138.



who is clothed with the legal evidence of title, or who is in fact entitled to receive the goods. He must keep in view simply the duty to make proper delivery and must be free from any charge of bad faith. If the delivery be improperly made, the question of his release for any cause, outside of misconduct through bad faith, is for the jury, unless upon a question of estoppel upon facts they may find.<sup>1</sup> Whenever a delivery to the consignee in person is required to be made by the carrier, it is the duty of the carrier to seek him and make tender of the goods.<sup>2</sup> A misdelivery by a carrier is treated as a conversion of the goods by him.<sup>3</sup> The carrier will be liable to the shipper for the value of goods delivered to a third person on the order of the consignee at the place of shipment.<sup>4</sup> But where the carrier delivered to the person to whom they are sent, although by false and fraudulent devices, that person personates another, to whom the consignor believed he was sending the goods, the carrier, if acting in good faith and with due diligence, is not liable.<sup>5</sup>

Where two men of the same name live in the same town, and one of them orders goods from a merchant at a distance, the carrier, on delivering the goods to the man who ordered them, is not responsible, simply because the consignor thought his order was from the other of the two men. But in the absence of either, the right of a shipper to recover from the carrier for delivering goods

<sup>1</sup> *Forbes v. Boston & L. R. Co.* 133 Mass. 154; *Duff v. Budd*, L. R. 5 Exch. 50; *American Exp. Co. v. Fletcher*, 25 Ind. 492; *American Exp. Co. v. Stack*, 29 Ind. 27; *Southern Exp. Co. v. Van Meter*, 17 Fla. 783, 35 Am. Rep. 107; *Price v. Oswego & S. R. Co.* 50 N. Y. 215, 10 Am. Rep. 475; *Sword v. Young*, 89 Tenn. 126, 129; *Winslow v. Vermont & M. R. Co.* 42 Vt. 700; *McEntee v. New Jersey S. B. Co.* 45 N. Y. 34, 6 Am. Rep. 28; *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Powell v. Myers*, 26 Wend. 591; *Little Rock, M. R. & T. R. Co. v. Glidewell*, 39 Ark. 487; *Rogers v. Weir*, 34 N. Y. 463; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Bull v. Liney*, 48 N. Y. 6, 8 Am. Rep. 511.

<sup>2</sup> *Schroeder v. Hudson River R. Co.* 5 Duer, 55.

<sup>3</sup> *Clafin v. Boston & L. R. Co.* 7 Allen, 341; *Viner v. New York, A. G. & W. S. Co.* 50 N. Y. 23; 3 Woods, Railway Law, 1594.

<sup>4</sup> *Southern Exp. Co. v. Dickson*, 94 U. S. 549, 24 L. ed. 285.

<sup>5</sup> *Samuel v. Cheney*, 135 Mass. 278, 46 Am. Rep. 467; *Dunbar v. Boston & P. R. Corp.* 110 Mass. 26, 14 Am. Rep. 576; *McKeun v. McIver*, L. R. 6 Exch. 36; *Norwalk Bank v. Adams Exp. Co.* 4 Blatchf. 455; *Wilson v. Adams Exp. Co.* 27 Mo. App. 360; *Bush v. St. Louis, K. C. & N. R. Co.* 3 Mo. App. 62.

to a swindler who ordered them in the name of a responsible person, is not dependent upon the shipper's discovering the fraud and stopping the goods *in transitu*.<sup>1</sup> A carrier who delivers goods ordered in a fictitious name, upon the presentation of an unindorsed bill of lading made out in an assumed name, and without requiring any identification, is liable to the consignor for the price of the goods. Subsequent purchasers in good faith from one to whom goods shipped to a person who ordered them in a fictitious name were delivered by the carrier upon the presentation of an unindorsed bill of lading made out in an assumed name, and without requiring any identification, are not liable for the goods.<sup>2</sup> Carriers and express companies are liable for money sent to a fictitious person by the fraud of their agent, on a bill of lading executed by such agent in favor of such fictitious person, and converted and embezzled by the agent.<sup>3</sup>

An action was brought against an express company for the failure to deliver a package of money consigned by the plaintiff to one A. The receipt given for the package stipulated that it was to be delivered to A in person. The express company answered that the express agent at the place to which the package was addressed, was also the telegraph operator at that place; that a person pretending to be said A came to the agent and sent a telegram through him to plaintiff, requesting that the money for which the action was brought, should be sent; that in answer to said telegram, said money was sent by plaintiff, addressed to A, and that the same person who had sent said telegram called for and demanded said package, representing himself to be the person to whom the money was addressed, and the money was therefore delivered to him by the defendant. It was held, however, that the answer did not show such a degree of care and caution as would relieve the defendant from liability—even if charged as a forwarder only.<sup>4</sup>

<sup>1</sup> *Wilson v. Adams Exp. Co.* 27 Mo. App. 360, 43 Mo. App. 659.

<sup>2</sup> *Sword v. Young*, 89 Tenn. 126, 129.

<sup>3</sup> *Jasper Trust Co. v. Kansas City, M. & B. R. Co.* 99 Ala. 416.

<sup>4</sup> *American Exp. Co. v. Fletcher*, 25 Ind. 492.

§ 140. *Delivery in Bad Condition—Shortage.* See *ante*, § 40.

Where the master correctly designates the consignee on delivery to the cars, shortage in quantity delivered, caused by forwarding one carload thereof to the wrong consignee through mistake, in which the consignee's agent participated, cannot be offset to the demand for freight, as it was not the master's duty to act as forwarder. Consignees whose agents assist in selecting what is delivered, and accept it as what they are entitled to by their bill of lading, and cause it to be sent away, must show satisfactorily that what was thus accepted was less than should have been delivered, and that their failure to receive all they should have received is attributable to some default on the part of the ship, in order to hold the latter liable for a deficiency under a bill of lading stating that the vessel is not accountable for the number of pieces or weight.<sup>1</sup> Although two lots of which the bills of lading state that the master does not know the weight, are not kept distinct, in the absence of any proof that the consignee of one lot received more than belonged to him, or that the whole amount received by the carrier has not been delivered, the other consignee cannot recover from the carrier for a deficiency in quantity.<sup>2</sup>

Where kegs and casks unloaded from a vessel by lighters are damaged and partially empty when delivered, and there is proof that they were selected as especially strong and good ones for the purpose, and the ship fails to call any of the lightermen to prove whether they were delivered from the lighter in the same condition that they were in when received, and the proof of the insufficiency of the casks is not satisfactory,—the vessel will be held liable.<sup>3</sup> Where the shortage in weight of a cargo of sugar is not one per cent of the amount stated in the bill of lading, but there is a shortage of a few bags, the vessel cannot be held liable, on evidence that her hatches were kept battened down until the un-

<sup>1</sup> *Eaton v. Neumark*, 33 Fed. Rep. 891, 37 Fed. Rep. 375.

<sup>2</sup> *Schultz v. The Pietro G.* 40 Fed. Rep. 497.

<sup>3</sup> *Cumming v. The Barracouta*, 40 Fed. Rep. 498.

lading was taken charge of by the charterer, and that all the sugar received was delivered, although an interrogatory, answered on the part of the ship, states a number of bags marked as described in the bill of lading which were delivered, to be a few less than the number stated in the bill, but another answer states the total number of bags delivered to be more than that stated in the bill, while there is proof of very rough handling of the bags in unloading them, against the protest of the ship's officers, and that there was an unusual quantity of sweepings, which were placed in new bags.<sup>1</sup> A canal boat hired at a daily rate for use in storing grain about the harbor, to be subject wholly to the control of the hirer in respect to loading, unloading, navigation, and delivery of cargo, is not a carrier or a warehouse, and is not liable for a shortage in cargo by a sale thereof by a man whose services in taking care of the boat were included in its hire, but who, though called "captain," had nothing to do with the cargo or navigation.<sup>2</sup> That a carrier who has agreed to take at cost a car-load of fruit arriving in damaged condition, and turn it over to the consignees to sell on its account, to apply on its liability for the goods, did so under the mistaken belief that the car was damaged by a wreck, when it was in fact only delayed thereby,—will not affect its liability.<sup>3</sup>

A railroad company is not liable for injury to freight resulting from exposure to mud and rain in consequence of the company's violation of its contract with the road over which the freight was shipped, to maintain a narrow gauge track for the benefit of that road, as the exposure and not the failure to maintain the track is the proximate cause of injury.<sup>4</sup> Under an act prescribing a penalty against railroad companies which refuse to deliver goods and merchandise upon payment or tender of the freight charges due by the bill of lading, a consignee of goods can put the railway in default and recover the penalty only upon a tender of the amount due as freight under the bill of lading, and not where he refuses

<sup>1</sup> *Kerbuish v. Havermeyer's & E. Sugar Ref. Co.* 42 Fed. Rep. 511.

<sup>2</sup> *The Daniel Burns*, 52 Fed. Rep. 159.

<sup>3</sup> *Grinnell v. Wisconsin Cent. R. Co.* 47 Minn. 569.

<sup>4</sup> *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 12 Ry. & Corp. L. J. 110.

to receive a portion of the goods or to pay a proportion of the freight charges, on the ground that they were damaged in the transportation.

The carrier is not liable for damage to goods arising without his fault from the nature of the articles themselves, as decay of fruit, or working of liquors that have a tendency to ferment or leak.<sup>2</sup> Where potatoes were shipped at Hamburg, unsound and unfit to ship and were lost by decay on the voyage, the vessel is not liable for such loss, as it is occasioned by the negligence of the shipper.<sup>3</sup> The fact that part of a cask of brandy is lost by leakage, in the absence of proof that the remaining portion is rendered of less value per gallon, will not excuse the consignee from receiving it and holding the carrier liable only for the lost portion.<sup>4</sup>

### § 141. *Failure to Deliver.*

Although it is the duty of the carrier upon the arrival of goods, to deliver them with reasonable promptness, yet a mere delay in the delivery is not a conversion of the property, and it will not entitle the owner to recover the value thereof.<sup>5</sup> But where the carrier has retained the goods after proper demand or for an unreasonable time after arrival without proper justification their destruction in his hands will not be excused by any exception in his bill of lading, nor even by the act of God.<sup>6</sup> A carrier is liable for nondelivery of goods delivered to it for transportation from Alabama to New York, where they do not reach the place of destination until the lapse of two to five months after the shipment.<sup>7</sup> A contract by a carrier exempting it from liability from wrong carriage or wrong delivery of goods marked with initials

<sup>1</sup> *St. Louis, A. & T. R. Co. v. Johnson*, 53 Ark. 282.

<sup>2</sup> *Brown v. Clayton*, 12 Ga. 564; *Clark v. Barnwell*, 53 U. S. 12 How. 282, 13 L. ed. 989; *The Howard v. Wissman*, 59 U. S. 18 How. 231, 15 L. ed. 363; *Lawrence v. Denbreens*, 66 U. S. 1 Black, 170, 17 L. ed. 89; *McKintay v. Morrish*, 62 U. S. 21 How. 343, 16 L. ed. 100; *Nelson v. Woodruff*, 66 U. S. 1 Black, 156, 17 L. ed. 97.

<sup>3</sup> *The Howard v. Wissman*, *supra*.

<sup>4</sup> *Howe v. Oswego & S. R. Co.* 56 Barb. 121.

<sup>5</sup> *Brigg v. New York Cent. R. Co.* 28 Barb. 515.

<sup>6</sup> *Richmond & D. R. Co. v. Benson*, 86 Ga. 203.

<sup>7</sup> *Alabama G. S. R. Co. v. Eicher* 100 Ala. 224.

or numbers, or imperfectly marked, does not apply so as to exempt it from liability, where the goods are not delivered at all, but delivery is refused when demanded.<sup>1</sup> An owner of a cargo cannot dispute its delivery when he has taken it from the store into which it was put by the master of the vessel, subject to freight, and has given security for the freight.<sup>2</sup>

Where wheat reached the depot and was landed on the platform in the evening on the arrival of a train, and when demanded by the consignee next morning, could not be found—the carrier was held answerable for its value.<sup>3</sup> Property which has not been the subject of traffic and has no fixed value at the place of destination, is to be valued by the market value of property at or near the place of its destruction.<sup>4</sup> Where goods are lost, interest must be allowed as damages upon the value of the goods.<sup>5</sup> The value of goods at their place of destination—with interest—deducting freight charges, where they have not been paid, is the rule where the goods have been lost.<sup>6</sup>

### § 142. *Statutory Penalties for Non-Delivery.*

In many of the states statutes have been passed imposing penalties upon railroads for refusing to deliver freight on payment of the stipulated charges, as shown by the way bill. Such a state statute prohibiting a greater charge by a carrier for transportation of freight than specified in the bill of lading, and imposing a penalty for refusal to deliver on payment of agreed charges, as shown in such bill, is not a regulation upon interstate commerce, but is within the police power of the state.<sup>7</sup> No penalty can be charged under a state statute providing against overcharges and discrimi-

<sup>1</sup> *Richmond & D. R. Co. v. Benson*, 86 Ga. 203.

<sup>2</sup> *The Adella S. Hills*, 7 Fed. Rep. 76.

<sup>3</sup> *Milwaukee & M. R. Co. v. Fairchild*, 6 Wis. 403.

<sup>4</sup> *Harris v. Panama R. Co.* 3 Bosw. 7.

<sup>5</sup> *Kyle v. Laurens R. Co.* 10 Rich. L. 382, 70 Am. Dec. 231.

<sup>6</sup> *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 350; *Rome R. Co. v. Sloan*, 39 Ga. 636.

<sup>7</sup> *Gulf, C. & S. F. R. Co. v. Nelson*, 4 Tex. Civ. App. 345; *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) Feb. 28, 1894; *Little Rock & Ft. S. R. Co. v. Hanniford*, 1 Inters. Com. Rep. 580, 49 Ark. 291.

nations in the shipment of freight by railway companies, where the contract is one for interstate shipment.<sup>1</sup>

Code, § 1967, imposing a penalty on railroad companies for the detention of freight more than five days after delivery for shipment without the consent of the shipper, as regards freight to be shipped to another state does not conflict with U. S. Const. art. 1, § 8, cl. 3, delegating the power to regulate interstate commerce to the federal government, since its enforcement would expedite, and not obstruct interstate traffic.<sup>2</sup> Under an act imposing a penalty upon a carrier violating either or several of its provisions, a carrier is liable to the penalty upon violation of any one of such provisions.<sup>3</sup> A statute prescribing a penalty for refusing to deliver goods upon the payment or tender of payment of the freight charges due, as shown by the bill of lading, is not repealed by a later act prescribing a penalty for a failure to deliver property at the regular or appointed time, without reference to the payment or tender of payment of the freight charges.<sup>4</sup>

A bill of lading for through shipment of goods to a designated point, "subject to the published tariff of the company and its connections," makes a published local tariff rate for an intermediate point a part of the contract; and the company cannot, without rendering itself liable for the penalty prescribed for every day's detention, refuse to deliver the goods at such intermediate point on a tender of a local rate, on the ground that the bill of lading is controlled by the through tariff schedule.<sup>5</sup> A bill of lading sufficiently shows the amount of freight charges due as required by Tex. Rev. Civ. Stat. art. 4258a, imposing a penalty upon any railway company refusing to deliver freight upon the payment or tender of the freight charges due as shown by the bill of lading, where it states the freight to be 25 cents per hundred weight, so that the amount of freight is ascertainable at any time.<sup>6</sup> An ex-

<sup>1</sup> *Wright v. Howe* (Tex. Civ. App.) Dec. 7, 1893.

<sup>2</sup> *McGuigan v. Wilmington & W. R. Co.* 95 N. C. 432; *Bagg v. Wilmington, C. & A. R. Co.* 14 L. R. A. 596, 109 N. C. 279, 11 Rep. & Corp. L. J. 78.

<sup>3</sup> *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65.

<sup>4</sup> *St. Louis, A. & T. R. Co. v. McKee* (Tex.) Oct. 26, 1889.

<sup>5</sup> *Atchison, T. & S. F. R. Co. v. Roberts*, 3 Tex. Civ. App. 370.

<sup>6</sup> *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) Feb. 28, 1894.

pense account of a railway company showing the amount of freight charges due on goods shipped, is not a part of the bill of lading within the meaning of an act imposing a penalty upon railroad companies for refusal to deliver goods shipped by them "on payment of the freight charges as shown by the bill of lading."

Refusal by a railroad company to deliver goods shipped, on tender of the freight charges, when the amount is not shown by the bill of lading, is not a violation subjecting railroad companies to a penalty for the detention of goods shipped by them, for refusing to deliver them "on payment of the freight charges due as shown by the bill of lading," as such statute is penal, and one enforcing the penalty must bring himself strictly within its provisions.<sup>1</sup> An action to recover a statutory penalty from a carrier for retaining goods after the amount of freight has been tendered cannot be maintained under an act providing for such penalty, and basing the amount to be recovered on the amount of freight designated in the bill of lading, where the bill of lading does not give sufficient data from which the amount of freight can be ascertained; nor can an expense account showing the amount of freight be resorted to, where it is not referred to in the bill of lading.<sup>2</sup> Under a statute providing for the prompt delivery of freight by railroad companies upon payment of the freight rate prescribed by the bill of lading, where the bill of lading fails to specify the weight of the goods, it is the company's duty to weigh them without unreasonable delay, and ascertain the amount of freight due; and a failure so to do will make it liable, according to the measure of damages prescribed, for a refusal to deliver upon payment of the prescribed rate.<sup>3</sup>

That a bill of lading does not show the freight rate over a portion of the route is no defense to an action to recover the statutory penalty for a railway company's refusal to deliver the freight to the owner and consignee, where such rate is disclosed by the petition, together with the bill of lading attached thereto. It is no defense to an action against a railway company to recover the

<sup>1</sup> *Schlöss v. Atchison, T. & S. F. R. Co.* 85 Tex. 601.

<sup>2</sup> *Texas & P. R. Co. v. Wood* (Tex. Civ. App.) Nov. 1, 1893.

<sup>3</sup> *Little Rock & Ft. S. R. Co. v. Hanniford*, 1 Inters. Com. Rep. 580, 49 Ark. 291.



penalty imposed by Tex. Rev. Civ. Stat. art. 4258a, §§ 1-3, for its failure or refusal to deliver freight to the owner, that the shipment was made to the shipper's order, and that plaintiff was not the consignee named in the bill of lading, where such bill was indorsed by the shippers to plaintiff. A custom of railroad companies in the United States for the delivering carrier to take up bills of lading before delivering freight to the consignee and owner, for the purpose of holding such bills as evidence of having delivered the freight to the right party, is unenforceable.<sup>1</sup> A railway company which refuses to deliver goods upon tender of the amount of freight charged, to be paid by the consignee, as shown by the bill of lading, on the ground that such tender was made under protest, is liable for the penalty prescribed by a state statute for every day's detention of the goods.<sup>2</sup>

It is not necessary for the owner of freight to give the carrier notice, at the time of shipment, that loss of wages paid the owner's employees will result from delay in delivering the same, in order to recover the amounts so paid, in an action to recover the statutory penalty for withholding the delivery of such freight on payment of the freight charges shown by the bill of lading.<sup>3</sup> The liability of a railway company for the statutory penalty imposed for demanding more freight than that named in the bill of lading and refusing to deliver to the consignee upon the tender of the freight named therein, cannot be avoided or reduced by proof of the willingness of the seller or shipper of the goods to pay the excess demanded.<sup>4</sup> Where a railroad company has no depot or station agent at a certain station, and is accustomed to deliver goods destined to that place at another station, a demand for goods destined to such first station, made at the other station, where they were being detained, is sufficient to subject the company to a penalty for their nondelivery, under Sayles's (Tex.) Civ. Stat. art. 4258a.<sup>5</sup> Delay of a railroad company in producing upon

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. McGown* (Tex. Civ. App.) Feb. 28, 1894.

<sup>2</sup> *Atchison, T. & S. F. R. Co. v. Roberts*, 3 Tex. Civ. App. 370.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Loonie*, 84 Tex. 259.

<sup>4</sup> *Dillingham v. Fischl*, 1 Tex. Civ. App. 546.

<sup>5</sup> *St. Louis, A. & T. R. Co. v. McKee* Tex. Oct. 26, 1889.

request a receipt for lost goods from a steamship company to which it was the company's duty to deliver them, caused by mistake in producing the receipt of the first railroad company beyond it in the line of transportation, is not such "willful failure and refusal" to deliver the receipt as will deprive the company of the benefit of a statutory provision permitting the initial carrier to relieve itself from liability for loss by the production of such receipt, where from the terms of the Act it was very doubtful whether or not the receipt of the steamship company would suffice and the Act had never been judicially construed.<sup>1</sup> The penalty provided by a state statute for the refusal of a railroad company to deliver freight on payment or tender of the charges due as shown by the bill of lading applies only to a company which has itself executed, authorized, or ratified the execution of the bill of lading. A carrier cannot be considered as ratifying the original contract of shipment for goods which it receives from another company and transports, when it is bound by statute to perform such service.

The exhibition of the bill of lading at the time of the tender of the charges and demand of the goods is not a condition precedent to a recovery, under a statute, for refusal to deliver goods, although such penalty should be inflicted only for a willful disregard of the law.<sup>2</sup> A railway company which voluntarily affirms and ratifies a through freight rate established by the Interstate Commerce Commission, and provided for in a bill of lading issued by the initial carrier, by offering to accept such rate upon the surrender of the bill of lading, cannot defend an action against it to recover the statutory penalty for refusing to deliver the freight, on the ground that the initial carrier had no authority to bind it by the freight rate specified in the bill of lading.<sup>3</sup> An initial railroad company which delivers a through bill of lading to a shipper is not liable to a penalty of \$500 imposed by a local statute, for exacting more than the maximum freight rates, where it delivered the goods to a connecting carrier by which the

<sup>1</sup> *Miller v. South Carolina R. Co.* 9 L. R. A. 833, 33 S. C. 359.

<sup>2</sup> *Dwyer v. Gulf, C. & S. F. R. Co.* 7 L. R. A. 478, 75 Tex. 572.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. McCown* (Tex. Civ. App.) Feb. 28, 1894.

overcharge was exacted.<sup>1</sup> A defendant carrier who refuses to deliver goods on tender of the charges shown by the bill of lading, claiming that he had paid to another carrier the charges shown by the waybill, which exceeded those in the bill of lading, is not liable to the statutory penalty where the evidence shows that the bill was executed by another carrier and has not been ratified by the defendant.<sup>2</sup>

The statutory penalty for refusing to deliver freight on tender of the charges due as shown by the bill of lading cannot be recovered against a railroad which, on receiving the freight from a connecting line, paid the charges as shown on the waybill and in excess of those specified in the bill of lading, where the company by which the freight was shipped and which executed the bill of lading had no authority to bind the connecting line or the last company to carry at the specified rate; nor if, while shipped at an authorized rate, it was misrouted by a preceding carrier for whose acts the company is not responsible, and came to the company bound by the charges of the connecting line.<sup>3</sup> A railroad company while in the hands of receivers is not subject to a penalty for detention of stock after tender of the amount of freight due under a statute imposing a penalty upon railroads for the acts of their officers, agents, or employes, and not upon carriers generally.<sup>4</sup> A carrier is relieved from the duty to unload freight prescribed by a statute, by a voluntary express or implied agreement by the consignee to unload it.<sup>5</sup> A constitutional provision against special legislation is not violated by prohibiting the charge or collection by railroad companies of a greater rate of freight than the bill of lading specifies, and prescribing a measure of damages for refusal to deliver freight upon payment or tender of such specified rate.—that Act being general and uniform in its operation upon all persons coming within the class to which it applies.<sup>6</sup>

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Adair* (Tex.) Dec. 7, 1889.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Dwyer*, 84 Tex. 194.

<sup>3</sup> *Fordyce v. Johnson*, 56 Ark. 430.

<sup>4</sup> *Missouri, K. & T. R. Co. v. Stoner*, 5 Tex. Civ. App. 50.

<sup>5</sup> *Little Rock & Ft. S. R. Co. v. Bruce*, 55 Ark. 65.

<sup>6</sup> *Little Rock & Ft. S. R. Co. v. Hanniford*, 1 Inters. Com. Rep. 580, 49 Ark: 291.

### § 143. *What will Excuse Non-Delivery of Goods.*

The carrier will be excused from delivery where it is prevented by the act of the consignor.<sup>1</sup> As where the consignor exercises his right of stoppage *in transitu*.<sup>2</sup> But a vendor's right of stoppage *in transitu* is defeated by the transfer, by the consignee, of the bill of lading as security for a loan to a bona fide holder, although the consignee is insolvent, and the bill of lading transferred is marked "Duplicate," and that stamped "Original" is retained by the vendor.<sup>3</sup> This right of stoppage *in transitu* cannot be defeated, however, after refusal by the insolvent purchaser to receive the goods, in order that the seller might reclaim them, by his acceptance of the goods from the carrier or the insolvent messenger, before appointment of an assignee.<sup>4</sup> So the carrier will be excused from delivery to the consignee or the indorsee of a bill of lading, when the goods are demanded or taken from the possession of the carrier, by some person having a superior title to the property.<sup>5</sup> In general, the carrier is not permitted to dispute the title of the person who delivers the goods or to set up an adverse title, or to defeat his action of title according to his contract. But, when the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril,—and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods by the person setting up such adverse title.<sup>6</sup>

A common carrier may show, as an excuse for non-delivery, pursuant to his bill of lading, that he has delivered the goods, upon demand, to the true owner. While the bailee cannot avail himself of the title of a third person—for the purpose of keeping

<sup>1</sup> *Boyce v. Anderson*, 27 U. S. 2 Pet. 150, 7 L. ed. 379; *Boitman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562; *St. Louis & T. H. R. Co. v. Montgomery*, 39 Ill. 335; *Hastings v. Peppier*, 11 Pick. 41; *Southern Exp. Co. v. Kaufman*, 12 Heisk. 161; *Bush v. St. Louis, K. C. & N. R. Co.* 3 Mo. App. 62.

<sup>2</sup> *Stiles v. Howland*, 32 N. Y. 309; *Oppenheim v. Russell*, 3 Bos. & P. 42.

<sup>3</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

<sup>4</sup> *Tufts v. Sylvester*, 72 Me. 213.

<sup>5</sup> *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263, 44 Minn. 224.

<sup>6</sup> *Sheridan v. New Quay Co.* 4 C. B. N. S. 618.

the property for himself—yet, if he has delivered the property to its true owner on his demand, he is not answerable to the bailor.<sup>1</sup> The carrier, under such circumstances, is undoubtedly entitled to a reasonable time, taken in good faith, to examine into the adverse title of the claimants, and he may protect himself either by bill of interpleader, or by requiring an indemnifying bond;—but he must not—pending such delay—assert title in himself, but assign true reason for his action.<sup>2</sup>

If the goods have passed out of the carrier's possession, before the assertion of the adverse title, he is, of course, protected, having complied with his contract of shipment.<sup>3</sup> After goods in the possession of a carrier have been seized by a sheriff under attachment, they are in the custody of the law, and the carrier is not permitted to surrender them to the owner, although they may remain in his actual possession. The owner's remedy is against the officer who seized the goods, or against the plaintiff in the attachment suit.<sup>4</sup> A common carrier in whose hands goods shipped are attached discharges its duty to the consignor by giving notice of the attachment<sup>5</sup> to the latter's husband, having the bill of lading in his possession, since the carrier has the right to presume from such possession that the husband is the agent of the consignor, without further inquiry as to how or by what means he acquired such possession.<sup>6</sup> Where an attachment was levied by a sheriff, under a state statute, on property in course of transportation by ship to a consignee who had made advances upon bills of lading to the value of the goods, and the carrier failed to give notice of

<sup>1</sup> *Hentz v. The Idaho*, 93 U. S. 575, 23 L. ed. 978; *King v. Richards*, 6 Whart. 418, 37 Am. Dec. 420; *Hardman v. Willcock*, 9 Bing. 382; *Bates v. Stunton*, 1 Duer, 79; *Biddle v. Bond*, 6 Best & S. 225; *Cheeseman v. Ezell*, 6 Exch. 341; *Rosenfield v. Express Co.* 1 Woods, 131; *Wells v. American Exp. Co.* 55 Wis. 23, 42 Am. Rep. 695; *American Exp. Co. v. Greenhalgh*, 80 Ill. 68; *Wolfe v. Missouri Pac. R. Co.* 3 L. R. A. 539, 97 Mo. 473; *Western Transp. Co. v. Barber*, 56 N. Y. 544; *Young v. East Alabama R. Co.* 80 Ala. 100.

<sup>2</sup> *Rogers v. Weir*, 34 N. Y. 463; *Solomons v. Dawes*, 1 Esp. 83; *Green v. Dunn*, 3 Campb. 215.

<sup>3</sup> *Sheridan v. New Quay Co.* 4 C. B. N. S. 618.

<sup>4</sup> *Stiles v. Davis*, 66 U. S. 1 Black, 101, 17 L. ed. 33.

<sup>5</sup> *Jewett v. Olsen*, 18 Or. 419, 42 Am. & Eng. R. Cas. 435.

<sup>6</sup> *Furman v. Chicago, R. I. & P. R. Co.* 81 Iowa, 540, 45 Am. & Eng. R. Cas. 385.

the levy until the third day afterwards, while prompt notice would have prevented the acceptance of a draft on the consignee, and utterly failed to give written notice of the lien of the consignee on the goods, as required by the statute of the state in order to preserve the consignee's rights,—the carrier must be held liable to the consignee for the damage sustained.<sup>1</sup> Where goods are attached by due process of law the carrier must obey the attachment process.<sup>2</sup>

Seizure, by judicial process, of property in transportation, not brought about by any laches or connivance of the carrier, and of which prompt notice is given, is one of the implied exceptions in the carrier's contract as to liability for nondelivery.<sup>3</sup> Property in transit seized upon legal process sued out against the owner is in the custody of the law, and the carrier is excused from liability for not delivering it.<sup>4</sup> A carrier which does not know the ownership of property has the right to assume that the consignee is the owner, where the consignment is unqualified.<sup>5</sup> A carrier is not liable for goods sold under an attachment after it notified the owner thereof.<sup>6</sup> If seized at intermediate point, it excuses delivery at destination.<sup>7</sup> But the attachment proceedings must be valid against the owner in order to furnish a defense to the carrier.<sup>8</sup>

Seizure of goods by customs officers, resulting from the act of a mere intruder before the owner had a reasonable time to find and take possession, is no defense to a carrier, if they contain nothing dutiable.<sup>9</sup> In a case decided in England at *nisi prius*, by Lord Ellenborough, in 1808,<sup>10</sup> a vessel had been detained and

<sup>1</sup> *The M. M. Chase*, 37 Fed. Rep. 708.

<sup>2</sup> *Ohio & M. R. Co. v. Yoke*, 51 Ind. 181, 19 Am. Rep. 727; *Hayden v. Davis*, 9 Cal. 573; *Barnard v. Kobbe*, 54 N. Y. 516; *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Wilson v. Anderton*, 1 Barn. & Ad. 450.

<sup>3</sup> *The M. M. Chase*, *supra*.

<sup>4</sup> *Jewett v. Olsen*, 18 Or. 419, 42 Am. & Eng. R. Cas. 435.

<sup>5</sup> *Scammon v. Wells, Fargo & Co.* 84 Cal. 311, 42 Am. & Eng. R. Cas. 400.

<sup>6</sup> *Baltimore & O. R. Co. v. Davis*, 20 W. N. C. 504.

<sup>7</sup> *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143.

<sup>8</sup> *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213.

<sup>9</sup> *Hamburg-American Packet Co. v. Gattman*, 27 Ill. App. 182, affirmed in 127 Ill. 598.

<sup>10</sup> *Gosling v. Higgins*, 1 Campb. 451.

condemned in Jamaica for a breach of Revenue Laws; but on appeal the condemnation was reversed. It was held that the master was liable for a loss caused by the delay, the court saying: "You have an action against the officers. The shipper can only look to the owner or master of a ship." This last proposition is clearly wrong. We do not find the case cited in any late English work on carriers, and it is no doubt regarded as bad law. But in a late case in Massachusetts it was held that, in a suit against a common carrier for nondelivery of goods, it is no defense to say that they were taken from the carrier by an officer under an attachment against any one who was not their owner.<sup>1</sup> It is settled that the bailee may defend against the claim of the bailor, by showing that the goods have been taken from him by legal process. And in a note he adds: "If this defense were not valid, it might compel the party to resist the acts of a public officer in the discharge of his duty, which the law will never do."<sup>2</sup>

In New York, where the property was forcibly seized by a constable, on a complaint that the property had been stolen, the court said: "But my associates not passing upon the question whether the property was delivered to the true owners, desire to put this case upon the doctrine that the common carrier is exonerated from his obligation to his bailor, where the property of the latter is taken from him by due legal process, provided the bailor is promptly notified of such taking. . . . The judgment of the supreme court should therefore be affirmed." All affirm on the ground that when the property is taken from the carrier by legal process and he gives notice thereof, he is discharged.<sup>3</sup> In this same case in the supreme court, it was held that "the bailee must assure himself, and show the court that the proceedings are regular and valid, but he is not bound to litigate for his bailor, or to show that the judgment or decision of the tribunal issuing the process, or seizing the goods, was correct in law or in fact. This is the rule as to bailees in general, and it includes the case of common carriers."<sup>4</sup> The decision that a demand by virtue of a

<sup>1</sup> *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213.

<sup>2</sup> 2 Redf. Railways, 158.

<sup>3</sup> *Bliven v. Hudson River R. Co.* 36 N. Y. 403.

<sup>4</sup> *Bliven v. Hudson River R. Co.* 35 Barb. 191.

chattel mortgage after default is not such that a carrier must yield to as in case of a demand under legal process seems to be entirely new.

In a late case in South Carolina the plaintiffs bring the action to recover damages for the conversion of certain personal property alleged to belong to plaintiffs. The facts may be briefly stated as follows: On the 13th of October, 1887, one Clendenning delivered to the agent of defendant company at Prosperity the property in question, consisting of a lot of household goods, to be shipped by defendant's train to Laurens. After said agent had received and receipted for said goods, defendant's agent was notified by an agent of plaintiffs not to ship said goods, as they belonged to plaintiffs under a mortgage given by Clendenning to plaintiffs, the condition of which had been broken. The goods were, however, placed on the cars, and the cars sealed. Soon after this, and just before the arrival of the train for Laurens, one Hair, a constable, appeared at the depot with the mortgage, upon which an indorsement had been made by a trial justice, purporting to authorize said Hair to take possession of the goods, and demanded them from defendant's agent, who refused to deliver them, upon the ground that the paper was not sufficient; "that I ought to have had a distress warrant." Clendenning was present at the time, but, so far as appears from the evidence, neither said nor did anything. The goods remained at the depot, in the car in which they had been placed the evening before, until 1 o'clock the next day, when they were sent on to Laurens; no further steps having in the meantime been taken by plaintiffs to obtain possession of said goods. The mortgage above spoken of was given by Clendenning to the plaintiffs to secure the payment of a note which fell due on the 1st of May, 1887.

The plaintiffs having obtained judgment for the value of the goods, defendant appeals upon several grounds which need not be specifically stated, as the case turns upon the single question whether a common carrier who has received goods for transportation from one person, and given him a bill of lading therefor, is bound to surrender them upon demand to a third person, who claims to be the true owner thereof, under pain of being lia-



ble to an action for the conversion of said goods at the suit of such third person. It is conceded that under the stringent rule of the common law a common carrier is liable as an insurer for goods committed to his charge for transportation, and nothing but the act of God or the public enemies will excuse him for failure to deliver the goods at their destination to the person to whom he has contracted to deliver them,—the consignee. Under this rule it is very obvious that the carrier would be liable to his bailor even if the goods were taken from his possession by process of law, and much more so if he voluntarily delivered them to the true owner, for this would not be either the act of God or of the public enemy. But it is claimed, justly, that this stringent rule has been modified so as to excuse the carrier from liability where the goods have been taken from his possession by process of law, provided the carrier gives prompt notice of such seizure to his bailor; for, as it is well put by Campbell, Ch. J., in *Pingree v. Detroit, L. & N. R. Co.* 66 Mich. 143: "If he is excusable for yielding to a public enemy, he cannot be at fault for yielding to actual authority what he may yield to usurped authority."<sup>1</sup> And the same doctrine is, at least impliedly, recognized, though the point was not distinctly raised, in *Faust v. South Carolina R. Co.* 8 S. C. 118. It is also contended that the rule is still further modified so as to excuse the carrier from liability to his bailor for the nondelivery of goods intrusted to him for transportation if he can show that he has delivered the goods to a third person, who was the true owner, and entitled to the possession thereof, and the case mainly relied upon to establish this proposition is *Hentz v. The Idaho*, 93 U. S. 575, 23 L. ed. 978, though there are cases which have been decided in several states recognizing the same doctrine. The case of *Robertson v. Woodward*, 3 Rich. L. 251, seems to recognize the doctrine that an ordinary bailee—not a common carrier—may dispute the title of his bailor in an action of trover brought by the latter by showing that his bailor had sold the subject of the bailment before the bailment arose, and that defendant was authorized to defend the action, for the benefit of the purchaser. Assuming, that the

<sup>1</sup> See also *Stiles v. Davis*, 66 U. S. 1 Black, 101, 17 L. ed. 33.

stringent rule of the common law as to a carrier's liability has been thus further modified, the question remains whether thus modified it applies to the South Carolina case. It will be observed that the cases which establish or recognize this modification of the rule only go to the extent of holding that a common carrier may deliver the goods intrusted to him for transportation to the rightful owner upon his demand, and, if he does, he may defend himself against an action brought by his bailor to recover damages for the nondelivery according to the contract of bailment by showing that he has delivered the goods to the rightful owner; but none of them go to the extent of holding that he is bound to deliver them to one who demands them as rightful owner, unless it be the case of *Wells v. American Exp. Co.*, 55 Wis. 23, 42 Am. Rep. 695. In that case a package of money was intrusted to the carrier to be delivered to Wells & Cartwright. When the package addressed to Wells & Cartwright reached its destination, the money was demanded by Wells alone, he claiming to be the sole owner, and that Cartwright had no interest in it, to which Cartwright, being present, assented verbally, though "there was no assignment by Cartwright of his apparent interest in the package to Wells, and no written order by Cartwright to deliver to Wells, and no offer of any receipt or acquittance from both." The defendant refused to deliver the money to Wells alone, and insisted also that the money had been subjected to garnishee proceedings against Cartwright. Wells then brought his action, not upon the bill of lading or express receipt, but for money had and received, and the court held that, "irrespective of the garnishment," the plaintiff, having established his individual right to the money, was entitled to recover. The authorities cited by the learned judge, while they do establish the doctrine that a common carrier may, with safety, deliver to the rightful owner, do not establish the doctrine that he is bound to do so; and his assumption that the one follows from the other is not well founded. In addition to this, the action in that case was for money had and received, which does not necessarily imply a tort on the part of defendant; while here the action is for the conversion of the goods, which does involve the idea of tort. Again, in that case it appeared

that Cartwright, one of the persons named as consignee, was not only present when Wells, the other consignee, demanded the money, claiming it as his individual property, but actually assented to such claim, and hence the carrier had no excuse for refusing to comply with the demand.

It seems that the whole case turns upon the question whether a carrier, resting under very stringent obligations to his bailor, is bound to assume the burden, where a third person makes a demand upon him for goods intrusted to him for transportation, not enforced by legal process, of showing not only that such third person is the rightful owner, but is also entitled to the immediate possession of the goods. It seems that common justice would require that such burden should be assumed by the claimant, who is most likely to have the means of meeting it, and not upon the carrier, who cannot be supposed to know anything about the real ownership of the goods, and has a right to assume that the person from whom he received possession of the goods was such rightful owner; possession of personal property being evidence of title. The most that could be properly required of the carrier would be to hold the goods, notifying his bailor of the demand which had been made upon him, and let the claimant contest with the bailor the question of ownership. Under these views, the judgment below was not sustained. The goods were not seized or demanded under any legal process. The fact that the person selected as the agent of plaintiffs to enforce their mortgage claimed to be a constable did not affect the question, for, even where a mortgage of personal property is placed in the hands of the sheriff, with instructions from the mortgagee to seize and sell the mortgaged property, the sheriff does not act officially, but merely as the private agent of the mortgagee.<sup>1</sup> It is claimed, however, that the bailor, Clendenning, being present when the goods were demanded of the defendant's agent by the agent of the plaintiffs, and saying nothing, was an admission that plaintiffs were the rightful owners, and entitled to the immediate possession of the goods, and therefore defendant had no excuse for refusing to

<sup>1</sup> *Robins v. Ruff*, 2 Hill, L. 406.

comply with the demand. But what obligation rested upon him to interpose in the colloquy between the agents of plaintiffs and defendant. He delivered the goods for shipment to the defendant, and held its bill of lading obligating defendant to deliver them according to its terms, and there was no occasion for him to speak. If he had stood silently by and allowed the defendant to deliver the goods to plaintiffs, claiming to be the rightful owners, without protest or objection, he might have been estopped from subsequently claiming them from defendant; but his silence when plaintiffs were making an unsuccessful demand on defendant could not possibly affect the question involved here. The judgment was reversed.

McGowan, J., in concurring stated that "after careful consideration, it seems to me that, when a common carrier is intrusted with property for transportation, his first responsibility is to the person who has intrusted him with the property, and, upon claim of the property by a third party, that he should not be required, at his risk, to judge between the parties as to the ownership of the property. He should, however, always and at once yield to the force of legal process, which intervenes and takes the property, thus relieving the carrier from the responsibility of being judge in the matter. I have not been able to satisfy myself that the paper presented to the official of the railroad in this case was in the proper sense legal process. It seems to have been a simple mortgage of personal property, after condition broken, but there was about it none of the usual indicia of legal process, such as a summons, warrant, writ, or seal of the court. It did not appear that there had been any judicial determination of the matter, and the paper was in the hands of one who, on the occasion, was acting merely as the agent of the mortgagees. For this reason I concur in the opinion of the chief justice."

In a case where goods were seized on attachment, the court held: "If goods are taken from a bailee or carrier by authority of law, in any case coming within these exceptions, there is no doubt that it is a good defense to an action by the bailor or shipper, for a nondelivery." In Vermont, where goods in the hands

<sup>1</sup> *Van Winkle v. United States Mail SS. Co.* 37 Barb. 122.

of a wharfinger were seized under legal process, the court held that if they were taken from the wharfinger or warehouseman, by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner.<sup>1</sup> In order, however, that such seizure may be a legal excuse for the non-delivery of the goods, it must be shown that the proceedings or process under which it was made by the officer was legal and valid, and that it empowered him to make it; for if it was void because issuing from a court having no jurisdiction, or for any other reason, and conferred no such authority, he would be a mere trespasser, and the carrier would be no more obliged to submit to his acts under it than to any other wrong-doer.<sup>2</sup>

Common carriers are not included in the provision of Rev. Stat., chap. 30, § 12, imposing a penalty on "whoever . . . has in possession" between October 1 and January 1, more than the number therein specified of the carcasses of certain wild animals. A shipper's knowledge of directions to the carrier's agent not to receive certain articles for transportation will not relieve the carrier from liability for their loss if their transportation is actually undertaken. The game laws of a state can give no authority to take carcasses of animals, or parts thereof, while in the course of interstate transportation, away from a common carrier on the ground that the animals have been killed in violation of such laws. Seizure of property in the course of transportation, by an officer, without a warrant or other legal process, does not excuse the carrier for nondelivery.<sup>3</sup>

Where the property of the plaintiff, while in the hands of the defendant as common carrier, *in transitu*, was seized by an officer without any warrant or other legal process, and none was ever obtained, the officer was a mere trespasser, and the carrier was liable, under the rule of the common law, in the same manner as if it had allowed any other trespasser to take the property out of

<sup>1</sup> *Burton v. Wilkinson*, 18 Vt. 186, 46 Am. Dec. 145.

<sup>2</sup> *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Bliven v. Hudson River R. Co.* 36 N. Y. 403; *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213.

<sup>3</sup> *Bennett v. American Exp. Co.* 13 L. R. A. 33, 83 Me. 236.

its custody.<sup>1</sup> As against the consignor the seizure was of no more validity than a trespass by an unofficial person. Where there has never been any adjudication from any tribunal that the property seized was contraband, or other than the lawful property of the plaintiff, the common carrier is not relieved from the fulfillment of his contract, or his liability as such carrier, any more than if the loss had occurred from fire, theft, robbery or accident. He stands in the relation of insurer, where no special contract is shown, and upon grounds of public policy is liable for all losses resulting from accident, trespass, theft or any kind of unlawful disposition of the property intrusted to him to carry, excepting only such as arise by the act of God or public enemies.<sup>2</sup>

In the case of *Edwards v. White Line Transit Co.* 104 Mass. 163, 6 Am. Rep. 213, it was held that, while the carrier was not liable in trover for conversion of the property, he was nevertheless liable on his contract or obligations as common carrier, where the officer seizing the property was a trespasser. "The owner may, it is true," says the court, "maintain trover against the officer who took the property from the carrier; but he is not obliged to resort to him for his remedy. He may proceed directly against the carrier upon his contract, and leave the carrier to pursue the property in the hands of those who have wrongfully taken it from him." As a general rule, a common carrier is not liable for the loss of goods, if they be taken from his possession by legal process against the owner, or if, without his fault, they have become obnoxious to the police regulations of the state, and are seized and destroyed under their authority; but, to protect the carrier in such cases, it is necessary that the seizure be made without his procurement or connivance, that the proceeding or process under which it is made appear to be valid, and that the carrier give prompt notice of the seizure to the owner.<sup>3</sup>

Where, without the negligence of the carrier, the goods he is

<sup>1</sup> *Edwards v. White Line Transit Co.* 104 Mass. 163, 6 Am. Rep. 213.

<sup>2</sup> *Adams v. Scott*, 104 Mass. 166; *Kiff v. Old Colony & N. R. Co.* 117 Mass. 593, 19 Am. Rep. 429; *Fillebrown v. Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606.

<sup>3</sup> *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489; *Miami Powder Co. v. Port Royal & W. C. R. Co.* 21 L. R. A. 123, 38 S. C. 78.

transporting become infected so as to endanger public health, and they are taken possession of and destroyed by the public authorities—and where the goods in themselves are under the local law subject to confiscation, the legal enforcement of the penalty will discharge the carrier.<sup>1</sup> A railroad company with knowledge of the fact is not exempt from liability for damages for failure to deliver freight for the reason that the freight is to be used for an illegal purpose at the point of destination, unless that illegal purpose was the consideration of the contract.<sup>2</sup>

A railroad company is not liable for damages for refusing to deliver goods shipped to one who does not produce a bill of lading or sufficiently identify himself as the owner, although he offers security.<sup>3</sup> The holder of a bill of lading cannot recover against the carrier for refusal to deliver the goods, when it appears that before he purchased such bill the consignor had consented to a delivery by the carrier to the consignee, and had received payment by the consignee for the goods.<sup>4</sup> So the carrier may excuse delivery, on the ground that in order to save the vessel and preserve life he was compelled to cast the goods overboard.<sup>5</sup>

<sup>1</sup> *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232; *Wells v. Maine SS. Co.* 4 Cliff. 228; *Pierce v. New Hampshire*, 46 U. S. 5 How. 504, 12 L. ed. 256; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Bliven v. Hudson River R. Co.* 31 Barb. 191. But see *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36.

<sup>2</sup> *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, 110 N. C. 338.

<sup>3</sup> *Gulf, C. & S. F. R. Co. v. Freeman* (Tex. App.) 9 Ry. & Corp. L. J. 497.

<sup>4</sup> *Alabama Nat. Bank v. Mobile & O. R. Co.* 42 Mo. App. 284.

<sup>5</sup> *Smith v. Wright*, 1 Cai. 43, 2 Am. Dec. 163.

## CHAPTER XXII.

### DELIVERY OF GOODS,—Continued.

§ 144. *Delivery by Carrier by Water.*

§ 145. *Demurrage.*

§ 146. *When Liable only as Warehouseman.*

#### § 144. *Delivery by Carrier by Water.*

A carrier by water must convey goods from port to port, or from wharf to wharf. An actual or manual transfer of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability as such.<sup>1</sup> A delivery must be made at a safe and proper place. Landing heavy goods upon an insufficient wharf renders the carrier liable if it breaks.<sup>2</sup> He is not bound to deliver at the warehouse of the consignee; it is the duty of the consignee to receive the goods out of the ship or on the wharf. The mere landing goods on a wharf is not sufficient.<sup>3</sup> But a delivery on the usual wharf will discharge the master, provided he gives notice to the consignee that he may come and take them.<sup>4</sup>

To constitute a valid delivery on the wharf, the carrier was required by the common law of the state to give due and reasonable notice to the consignee,<sup>5</sup> so as to afford him a fair opportunity of

<sup>1</sup> *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>2</sup> *The Majestic*, 12 N. Y. Leg. Obs. 100.

<sup>3</sup> *Salmon Falls Mfg. Co. v. The Tangier*, 6 Am. L. Reg. 504; *The Mary Washington v. Ayres*, 5 Am. L. Reg. N. S. 692; *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 481, 18 L. ed. 486.

<sup>4</sup> *Hyde v. Trent & M. Nav. Co.* 5 T. R. 397; *Chickering v. Fowler*, 4 Pick. 371; *Cope v. Cordova*, 1 Rawle, 203; *Ostrander v. Brown*, 15 Johns. 39, 8 Am. Dec. 211; *Dibble v. Morgan*, 1 Woods, 406; *The Tybee*, 1 Woods, 358; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *Shenk v. Philadelphia Steam Propeller Co.* 60 Pa. 109, 100 Am. Dec. 541; *Western Transp. Co. v. Husley*, 1 Daly, 327; *Solomon v. Philadelphia & N. Y. Exp. S. B. Co.* 2 Daly, 104.

<sup>5</sup> *The Ville De Paris*, 3 Ben. 277.



providing suitable means to remove the goods, or put them under proper care and custody, but changes in navigation and rapid transportation and a reasonably ascertainable time of arrival has modified this requirement of notice to the consignee.<sup>1</sup> Such a delivery to be effectual, should not only be at the proper place, which is usually the wharf, but at the proper time. Where the goods were deposited for the consignees in proper order and condition, at midday, on a week day in good weather, this constituted a good delivery.<sup>2</sup> This is the general commercial usage. The consignee must receive the goods at the wharf or from the ship.<sup>3</sup> He must deliver, within a reasonable time after the arrival of the ship. The circumstances of each case determine what is a reasonable time.<sup>4</sup>

But goods landed at a wharf before delivery to the consignee will be under the master's care and responsibility without additional expense to the consignee of them till they shall be ready for delivery.<sup>5</sup> Delivery after business hours is not good, nor is the consignee obliged to receive goods on a stormy day when they would be injured thereby.<sup>6</sup> But the consignee cannot object that goods were placed on wharf at the usual dinner hour of the truckmen.<sup>7</sup> The master of the ship has a reasonable time to find out the freight due, but he has no right meantime to store the goods at the owner's expense.<sup>8</sup> If the goods, on the arrival of the ship, are put on board a lighter, and the owner takes the custody of them before they are landed, the master is discharged.<sup>9</sup> An

<sup>1</sup> *Constable v. National SS. Co.* 154 U. S. 51, 38 L. ed. 903.

<sup>2</sup> *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>3</sup> *Richardson v. Goddard*, *supra*; *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 481, 18 L. ed. 486.

<sup>4</sup> *Hand v. Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Broadwell v. Butler*, 6 McLean, 296, 1 Newb. Adm. 171; *Gerhard v. Neese*, 36 Tex. 635; *Favor v. Philbrick*, 5 N. H. 353; *Nudd v. Wells*, 11 Wis. 408; *Ward v. New York Cent. R. Co.* 47 N. Y. 29, 7 Am. Rep. 405; *Parsons v. Hardy*, 14 Wend. 215, 28 Am. Dec. 521; *Gutcliffe v. Bourne*, 4 Bing. N. C. 314.

<sup>5</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177; *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412.

<sup>6</sup> *Eagle v. White*, 6 Whart. 505, 37 Am. Dec. 434; *Hill v. Humphreys*, 5 Watts & S. 123, 39 Am. Dec. 117; *The Grafton*, 1 Blatchf. 173; *Olcott*, Adm. 43.

<sup>7</sup> *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. 396.

<sup>8</sup> *The Diadem*, 4 Ben. 247.

<sup>9</sup> *Strong v. Natally*, 4 Bos. & P. 16.

owner of a cargo cannot dispute its delivery when he has taken it from the store into which it was put by the master of the vessel, subject to freight, and has given security for the freight.<sup>1</sup> Goods cannot be abandoned upon the wharf. If this is done, the carrier is responsible to the owner for their loss or injury.<sup>2</sup> The consignments must be separated.<sup>3</sup>

Delivery on a wharf is sufficient if due notice be given to the consignees, and the different consignments be properly separated so as to be open to inspection and contents easily accessible to their respective owners.<sup>4</sup> But where the consignee alone has the right to select the wharf and neglects or omits to do so, a vessel can refuse to discharge and can charge demurrage.<sup>5</sup> Where the delivery contemplated by the contract was a transfer of property into the power and possession of the consignees, the surrender of possession by the master must be attended with no fact to impair the title, or affect the peaceful enjoyment of the property. The delivery of the cargo into the customhouse, and demand of duties of the consignee is not a right delivery, and the consignees are not responsible for its safety afterwards.<sup>6</sup> The liability of a ship as a common carrier continues for a reasonable time to enable the shipper to claim and take possession of goods, although he is a passenger on the same ship and not entitled to notice.<sup>7</sup>

A carrier is not liable on his contract of affreightment for the loss by fire of goods where he delivered the goods at the place designated by the consignee, and where he received a large por-

<sup>1</sup> *The Adella S. Hills*, 47 Fed. Rep. 76.

<sup>2</sup> *Roland v. Miln*, 2 Hilt. 150; *McAndrew v. Whitlock*, 52 N. Y. 40, 11 Am. Rep. 657, affirming 2 Sweeny, 623.

<sup>3</sup> *The Middlesex*, 11 Law Rep. N. S. 14.

<sup>4</sup> *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412; *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 481, 18 L. ed. 486; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 397; *Chickering v. Fowler*, 4 Pick. 371; *Cope v. Cordova*, 1 Rawle, 203; *Ostrander v. Brown*, 15 Johns. 39, 8 Am. Dec. 211; *Dibble v. Morgan*, 1 Woods, 406; *The Tybee*, 1 Woods, 358; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *Shenk v. Philadelphia Steam Propeller Co.* 60 Pa. 109, 100 Am. Dec. 541; *Western Transp. Co. v. Hawley*, 1 Daly, 327; *Solomon v. Philadelphia & N. Y. Exp. S. B. Co.* 2 Daly, 104.

<sup>5</sup> *The Dictator*, 30 Fed. Rep. 637.

<sup>6</sup> *Howland v. Greenway*, 63 U. S. 12 How. 491, 16 L. ed. 391.

<sup>7</sup> *Hamburg-American Packet Co. v. Gattman*, 27 Ill. App. 182, affirmed in 127 Ill. 598.

tion of them after full and fair notice. Where the goods were deposited for the consignee in proper condition at midday, in good weather, this constituted a good delivery.<sup>1</sup> But proof of the acceptance of goods at a place of disaster, should be clear and satisfactory in order to operate as a discharge of the vessel. It should appear that acceptance was intended as a discharge of the vessel and the owner, from any further responsibility by which the contract in the bill of lading was rescinded.<sup>2</sup> When unable to carry the goods to their place of destination from causes over which he has no control—as by the stranding of a vessel—the master is still bound to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence.<sup>3</sup>

In the absence of any custom or express contract, it is the business of the ship to find a berth in the port of discharge.<sup>4</sup> An ocean vessel, reaching the port of delivery with a cargo consigned to several different parties, may generally select any suitable, proper wharf for the delivery. Any other mode of delivery may be impractical, and hence usage and custom sanction such a delivery; but, a usage may obtain which may make a different delivery obligatory. Thus, if the entire cargo was consigned to one person, unless there is a different usage,—the place of delivery being immaterial to the carrier—the consignee would have a right to designate the place of delivery.<sup>5</sup> Of course, where the wharf is specified, this will control the delivery;<sup>6</sup> otherwise, the prevailing custom at the port, or of the parties, will control the place of delivery.<sup>7</sup> The fact that a carrier usually discharges goods at his

<sup>1</sup> *Richardson v. Goddard*, *supra*.

<sup>2</sup> *Barrell v. The Mohawk* ("The Mohawk") 75 U. S. 8 Wall. 153, 19 L. ed. 406.

<sup>3</sup> *The Niagara v. Cordes*, 63 U. S. 21 How. 7, 16 L. ed. 41.

<sup>4</sup> *Smith v. New York & N. Granite Pav. Block Co.* 56 Fed. Rep. 527, affirming 56 Fed. Rep. 525.

<sup>5</sup> *Richmond v. Union S. B. Co.* 87 N.Y. 240; *The Sultana v. Chapman*, 5 Wis. 454; *The E. H. Fittler*, 1 Low. Dec. 114; *Dixon v. Dunham*, 14 Ill. 324.

<sup>6</sup> *McCullough v. Hellweg*, 66 Md. 269.

<sup>7</sup> *Richmond v. Union S. B. Co.* *supra*; *Salmon Falls Mfg. Co. v. The Tangier*, 1 Cliff. 396; *Montgomery v. The Port Adelaide*, 38 Fed. Rep. 753; *Dixon v. Dunham*, *supra*.

own wharf does not imply a contract to do so, when there is good reason for not doing so,—as, for instance, that its own wharf is full.<sup>1</sup>

Under what may be termed the common law of the sea, a delivery of the cargo to discharge the carrier from his liability, must be made upon the usual wharf of the vessel and actual notice be given to the consignee, if he be known. This was the ruling in the case of *Richardson v. Goldard*, 64 U. S. 23 How. 28, 39, 16 L. ed. 412, 416, and *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 481, 18 L. ed. 486, and is in conformity with the great weight of English and American authority.<sup>2</sup> This rule, however, originated prior to the era of steam navigation, when a voyage from Liverpool to New York rarely consumed less than three weeks; when the time of the arrival of the vessel could not be forecast with any accuracy; when crews were discharged immediately upon her arrival; and the vessel was usually detained several weeks in the slow and laborious process of unloading, taking on cargo, and refitting before setting out upon another voyage. Such methods of delivery were found wholly inadequate to the necessities of modern commerce, and particularly to the comparatively short voyages of the large transatlantic passenger steamers, which are kept permanently equipped with large and expensive crews, at a cost of several hundred dollars per day, and in order to be profitably employed must be kept in almost constant motion. In such cases the consignees of the cargo may be numbered by the hundreds, and a requirement that each consignee shall have a personal notice of the unloading of the cargo, in order to relieve the carrier from responsibility, would necessitate delays which might consume the entire profits of the voyage. It is of the utmost importance that the discharge of the cargo shall begin as soon as possible after the vessel arrives at her wharf, and if the consignee may sometimes be spurred to greater diligence, or put to some inconvenience in removing his consignments, he receives

<sup>1</sup> *Arnold v. National SS. Co.* 29 Fed. Rep. 184.

<sup>2</sup> *Hyde v. Trent & M. Nav. Co.* 5 T. R. 389; *Gibson v. Cu'ver*, 17 Wend. 305, 31 Am. Dec. 297; 1 Parsons, Ship. 222.

a compensation in the lower rate of freight the vessel is thereby enabled to charge.

To obviate the difficulties attendant upon the ancient method of discharging, the regular steamship lines are in the habit of providing themselves with wharves having covered warehouses, into which the cargo is discharged, and of inserting in their bills of lading stipulations that the responsibility of the vessel shall cease after the goods are discharged, and thus of extending their statutory exemption from fire to such as may occur before loading or after unloading. In view of the fact that the piers of the regular steamship lines are well known to every importer, and the day of arrival of each steamer may be predicted almost to a certainty, there is nothing unreasonable in this stipulation. An importer, having reason to anticipate the arrival of goods by a certain steamer, by putting himself in communication with the office of the company, may usually secure a notice of several hours of the actual arrival of the vessel at her wharf. It is also well known that, in lieu of a personal notice to each consignee or of publication through the papers a custom has grown up in the port of New York of posting on a bulletin board in the custom house a notice of the time and place of discharge. Taking all these facts into consideration, there is no impropriety in the company limiting itself to the liability of a warehouseman with respect to the goods so discharged into his own warehouse.<sup>1</sup>

It is true that it has been decided that a fire originating upon the dock could not be said to have "happened to the ship" within the meaning of section 4282 of the Limited Liability Act, even though the fire extended to and did some damage to the vessel,<sup>2</sup> but no good reason is perceived why, if a wise policy requires the exemption of the carrier from a fire occurring without his fault, such exemption should not extend to any such fire while the goods are in his possession and under his control, or at any time before actual delivery to the consignee. But, however this may be, there can be no question of the power of the carrier to extend his statutory exemption from fire to such as occur after the dis-

<sup>1</sup> *Constable v. National SS. Co.* 154 U. S. 51, 38 L. ed. 903.

<sup>2</sup> *Morewood v. Pollok*, 1 El. & Bl. 743.

charge of the cargo, by special stipulation to that effect in the bill of lading. *Ante*, § 45. Thus in *York Mfg. Co. v. Illinois Cent. R. Co.*, 70 U. S. 3 Wall. 107, 18 L. ed. 170, it was held that the common law liability of a carrier might be limited by special contract with the owner, and that the exemption in a bill of lading from losses by fire was sufficient to protect the carrier, if the fire were not occasioned by any want of due care on his part.<sup>1</sup> Indeed, a general exemption from the consequences of fire has been held to extend not only to fires happening on board the vessel, but to fires occurring to the goods while on the wharf awaiting transportation.<sup>2</sup>

No rule is better settled than that the delivery must be according to the custom and usage of the port, and such delivery will discharge the carrier of his responsibility. Thus in *Dixon v. Dunham*, 14 Ill. 324, it was said that "it was competent for the defendant," the carrier, "to set up a custom or usage in the port of Chicago, that goods should be delivered at the wharf selected by the master of the vessel, and that consignees should receive their goods there, with the averment of knowledge of such a custom in the plaintiff, and that this contract was made in accordance with it." So also in *Gutliffe v. Bourne*, 4 Bing. N. C. 314, Chief Justice Tindall said: "We know of no general rule of law which governs the delivery of a bill of goods under a bill of lading, where such delivery is not expressly according to the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery."<sup>3</sup> In *The Sultana v. Chapman*, 5 Wis. 454, there was a delivery at a place where the court held the boat had no right to leave the goods, and they were there destroyed. Under such circumstances, notwithstanding the exception in the bill of

<sup>1</sup> See also *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 382, 12 L. ed. 465, 482; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873.

<sup>2</sup> *Scott v. Baltimore, C. & R. S. B. Co.* 19 Fed. Rep. 56.

<sup>3</sup> See also *Farmers & M. Bank v. Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68; *Salmon Falls Mfg. Co. v. The Tungier*, 1 Cliff. 396; *Richmond v. Union S. B. Co.* 87 N. Y. 240; *Gibson v. Culver*, 17 Wend. 305, 31 Am. Dec. 297; *The Boston*, 1 Low. Dec. 464.

lading, the carrier was held not to be exempted from liability for the loss. "He had no right," said the court, "to place these goods where he did; and having done so, and a loss having ensued, he must be held responsible for it, as being occasioned by his own negligence or misconduct."

In the case of *The Santee*, 7 Blatchf. 186, a bill of lading covering a shipment of cotton, contained a clause that the cotton should be at the risk of the consignee as soon as delivered from the tackles of the vessel at the port of destination. It appeared that the consignee had proper notice of the arrival of the vessel, and of her discharge, and an opportunity by reasonable diligence to identify his cotton and receive it. The cotton was placed safely on the wharf, when discharged, and a portion of it, belonging to the libelants, was removed by some other person, but was not actually delivered by the agents of the vessel to such other party. It was held that the vessel was not liable for the loss. It is true that, in delivering the opinion, it was said the carrier was still bound to give suitable information to the consignees, to enable them to attend and receive the goods, and themselves assume and exercise that care and responsibility of which the carrier was to be relieved. But notice in this case was admitted to have been given, and the only question was whether under the bill of lading the carrier was liable after the cotton was discharged, and it was held that he was not. Nor was he "bound to watch the property after it passed beyond the vessel's tackles, to see that it was kept safe or protected from removal through mistake or design, by third persons."

In *Collins v. Burns*, 63 N. Y. 1, it was held that the clause providing for immediate discharge in the warehouse at the risk of the consignee of fire, loss, or injury, did not exonerate the carrier for delivering goods to the wrong party, or to a drayman who was not authorized to receive them. The court of appeals, however, held expressly that the liability of defendants was that of warehouseman, and, therefore, that they were responsible only for negligence.

So in *Turbell v. Royal Exch. Shipping Co.* 110 N. Y. 170, the goods were discharged from the ship and deposited on a proper

wharf, and after the consignee had had three full days to remove them, it was discovered that a part had been removed from the wharf by some one without the authority of the consignees. It was held that, as the loss occurred after the lapse of a reasonable time for removal of the goods by the consignees, after notice of arrival, defendant was not liable as a common carrier, but that the defendant was negligent in omitting to take ordinary care of the goods, and allowing them to be removed without taking receipts. It was expressly held, however, that the liability of defendant as carrier terminated with the delivery of the goods upon the wharf, and that its liability arose from its negligence in delivering them to the wrong person.

It has been claimed that the berthing of a ship at a pier other than her own was in legal effect a deviation, which rendered the company an insurer of the cargo discharged at such pier without notice, until its actual delivery to the consignee. In the law maritime a deviation is defined as a "voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the ship insured." As for instance, where a ship bound from New York to Norwich, Conn., went outside of Long Island, and lost her cargo in a storm<sup>2</sup> or where a carrier is guilty of unnecessary delay in pursuing a voyage, or in the transportation of goods by rail.<sup>3</sup> But, if such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer.<sup>4</sup> In *Hostetter v. Park*, 137 U. S. 30, 34 L. ed. 568, it was held to be no deviation, in the Pittsburg and New Orleans barge trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo *en route*, and to tow the same to the several points where the cargo might be stored, it having been shown

<sup>1</sup> Bouvier, Law Dict. 417; *Hostetter v. Park*, 137 U. S. 30, 40, 34 L. ed. 568, 572; *Davis v. Garrett*, 6 Bing. 716; *Williams v. Grant*, 1 Conn. 487, 7 Am Dec. 235.

<sup>2</sup> *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745.

<sup>3</sup> *Michaels v. New York Cent. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415.

<sup>4</sup> *Oliver v. Maryland Ins. Co.* 11 U. S. 7 Cranch, 487, 3 L. ed. 414; *Columbian Ins. Co. v. Catlett*, 25 U. S. 12 Wheat. 383, 6 L. ed. 664.



that such delays were within the general and established usage of the trade. So, in *Gracie v. Marine Ins. Co.* 19 U. S. 8 Cranch, 75, 3 L. ed. 492, it was held to be no deviation to land goods at a lazaretto or quarantine station, if the usage of the trade permitted it, though by the bill of lading the goods were "to be safely landed at Leghorn."<sup>1</sup>

In *Gleadeu v. Thomson*, 56 N. Y. 194, it was said of a similar stipulation in a bill of lading, that the goods should be taken from alongside by the consignee, immediately the vessel is ready to discharge: "The landing of the goods upon the pier of the plaintiff, under the circumstances of this case, did not, we think, change his relation to the goods, and divest him of his custody of them as a carrier. The privilege to make this disposition of them was secured to him by the bill of lading, unless the consignee was ready to take the goods from the ship whenever it was ready to discharge. It was not incumbent upon the plaintiff to give notice of a readiness to discharge the goods as a condition of his exercising the privilege of depositing them upon the pier. They, however, remained after such deposit in his custody as carrier, subject to the modified responsibility created by the contract, until after notice had been given to the consignees of their arrival, and a reasonable time had elapsed for their removal. Meanwhile the defendants assumed the risk of 'fire, loss or injury' to the goods, according to the contract, but the language used did not exempt the plaintiff from liability for an injury resulting from his own negligence." In a recent case the bill of lading read as follows:

National Steamship Company, Limited.

Head Office, 21 Water street, Liverpool; New York Office, 69 Broadway.

Liverpool to New York every Wednesday.

[Stamp, six pence.]

Shipped in good order and well conditioned, by Moore & Pringle, in and upon the steamship called the Egypt, whereof ——— is master for the present voyage, or whoever else may go as master in the said ship, and now lying in the port of Liver-

<sup>1</sup> See also *Phelps v. Hill* [1891] 1 Q. B. 605.

pool and bound for New York *via* Queenstown, with liberty to sail with or without pilots, and to tow and assist vessels in all situations and to all ports.

Forty-three cases merchandise (linens and cottons) three cases and five bales (carpets and Dundees) being marked and numbered as in the margin, and to be delivered subject to the following exceptions and conditions, viz: The act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of master or mariners, restraint of princes, rulers, or peoples, loss or damage resulting from vermin, rust, sweating, wastage, leakage, breakage, or from rain, spray, coal, or coal dust, insufficiency of strength of packages, inaccuracy, indistinctness, illegibility, or obliteration of marks, numbers, brands, or addresses, or descriptions of goods, injury to wrappers, however caused, or from corruption, frost, decay, stowage, or contact with or smell or evaporation from other goods, or from loss or damage caused by heavy weather or pitching or rolling of the vessel, or from inherent deterioration, risk of lighterage to or from the vessel, transshipment, jettison, explosion, spontaneous combustion, fire before loading in the ship or after unloading, heat, boilers, steam, or steam machinery, including consequences of defects therein or damages thereto, collision, stranding, straining, or other perils of the seas, rivers, steam and steam navigation or land transit of whatsoever nature or kind, and all damage, loss, or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner. Not accountable for weight, contents, value, length, measure, or quantities or condition of contents, nor for money, documents, gold, silver, bullion, specie, precious metals, jewelry, precious stones, or other highly valued goods, or beyond the amount of one hundred pounds sterling for any one package, unless bills of lading are signed therefor and the value therein expressed and freight paid accordingly. The National Steamship Company (Limited) or its agents or any of its servants are not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any claim, no-

tice of which is not given before the removal of the goods, nor for any claims for loss, damage, or detention to goods under through bill of lading where the loss or detention occurs or damage is done whilst the goods are not actually in the possession of the National Steamship Company (Limited) or shipped on board the National Steamship Company's (Limited) steamer, nor in any case for more than known or invoiced value of the goods, whichever shall be least. Goods of an inflammable, explosive, or otherwise dangerous character, shipped without permission of full disclosure of their nature and contents, may be seized and confiscated or destroyed by the shipowner at any time before delivery without any compensation to the shipper or consignee. In case any part of the within goods cannot be found for delivery during the vessel's stay at the port of destination they are, when found, to be sent back by first steamer at ship's expense, the steamer not to be held liable for any claim for delay or sea risk. The only condition upon which glass will be carried is that the shipowner shall not be held liable for any breakage which may occur from negligence or any other cause whatever. The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge or otherwise they will be landed by the master and deposited at the expense of the consignee and at his risk of fire, loss, or injury in the warehouse provided for that purpose or in the public store, as the collector of the port of New York shall direct, and when deposited in the warehouse or store to be subject to storage, the collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss, or injury. In the event of the said steamer being prevented from any cause from commencing or pursuing this voyage or putting back to Liverpool or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to have liberty to transship the goods by any other steamer to call at any port or ports. All fines, expenses, losses, or damage which the ship or cargo may incur or suffer on account

of incorrect or insufficient marking of the packages or description of their contents shall be paid by the shippers or consignee, as may be required, and the shipowner shall have a lien upon the goods for the payment hereof. In the case of all goods at through rates to the interior of the United States or Canada the shipper or consignee engages to supply the agent of the steamer at New York (F. W. J. Hurst) with the necessary papers for passing the goods through the customhouse by the time of steamer's arrival or to pay all extra expense incurred in default thereof. Should any existing or future order or restriction of the English emigration commissioners or of the English board of trade authorities prevent the above goods from being conveyed in any passenger vessel the National Steamship Company (Limited) or any of its servants or agents are to be free of any liability for nonfulfillment of their portion of this contract. In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions (whether written or printed) in the like good order and well conditioned, from the ship's tackle (where the ship's responsibility shall cease) at the aforesaid port of New York, unto Messrs. Arnold, Constable & Co. or to his or their assigns. Freight and primage for the said goods to be paid at New York as per margin. General average, if any, payable according to New York and Antwerp rules. Freight if payable in Liverpool, to be paid on delivery of the bills of lading in cash, without deduction, vessels lost or not lost. Freight, if payable abroad, to be paid in currency or gold (at the current rate of exchange for banker's sight bills on the day of the steamer's arrival) at consignee's option and before delivery of any portion of the goods specified. In witness whereof the master or agent of the said ship hath affirmed to two bills of lading, exclusive of the master's copy, all of this tenor and date, one of which bills being accomplished, the other to stand void.

A. Titherington.

Dated in Liverpool, 18 January, 1883.

(In the margin of the bill of lading appear the numbers of the various packages of merchandise).

The findings were (3) That the regular English steamship lines

usually dock at their own piers, but not always, and in case of any emergency dock elsewhere, and permit each other, when the necessity arises, to use the exclusive dock of each. (7) That for a month or more before January 31, 1883, respondent had been blocked up at its own pier, No. 39, in consequence of heavy cargoes, delays of its vessels by westerly winds and ice in the slips, and had, in consequence, been obliged to discharge two of its vessels at outside uncovered piers. (9) That steamers of regular lines, on their arrival at the port of New York, if their docks are blocked, are not kept in the stream longer than to enable them to berth elsewhere. If kept in the stream consignors make great complaint. It was more costly to dock the Egypt at pier No. 36, but it was done to secure to the consignees a more prompt discharge and delivery of their goods. (26) That pier No. 36 North river, was a fit and proper place to discharge the steamship Egypt at the time in question and to discharge from the libellants' goods.

The Supreme Court of the United States says, in deciding the questions presented, that there is no express provision in the bill of lading dispensing with notice to the consignee; a provision that the goods shall be taken from alongside by the consignee immediately the vessel is ready to discharge is inconsistent with the idea of personal notice, since such a notice would necessitate a delay of one or two days in the discharge of the cargo, while the notices were being given, where if the goods were not taken by the consignee, the carrier was authorized to deposit them at the risk of the consignee "in the warehouse provided for the purpose," meaning, of course, the warehouse upon the pier. Its obligation to give notice, if any such existed, must under the terms of the bill of lading, allowing an immediate discharge of the cargo, be contemporaneous with such discharge, and too late to be of any avail to the consignee. If it be true that the pier of the respondent company was so blocked that the Egypt could not obtain access to it to discharge her cargo it was, so far from being a deviation, a matter of ordinary prudence to select a neighboring pier for that purpose. Had this cargo been discharged at a remote, unusual, or inaccessible spot, or upon an uncovered pier, so that it was

exposed to the weather or to any unusual hazard, and a loss had been incurred, the carrier would have been liable, notwithstanding the stipulation against the consequence of negligence in its bill of lading.<sup>1</sup> But no such question is presented. While the libel alleges that the loss occurred through the negligence of the respondent, no effort was made to prove this, and there is no finding that such was the case. Indeed, there was nothing to indicate that the Inman pier was not a perfectly proper place to discharge a cargo, or that it was not equipped with the usual appliances for the extinguishment of fires.

It was also insisted, that libelants had a right to suppose that the Egypt would discharge her cargo at her regular pier, and that, while they might be bound to take notice of that fact, they were entitled, if she selected another pier, to a personal notice of the time and place of delivery, that an opportunity might be given them to be present and receive their consignments. But the court said, that if, under the usages of trade or the necessities of the particular case, it was allowable and proper for the respondent to select another pier for the discharge of its cargo, we do not understand that its obligation to its consignees was thereby increased or modified, at least unless the libelants can show that they were actually prejudiced by such change. Practically the same questions are involved, viz: whether if she had discharged at her own wharf, the company was bound to give notice before it could relieve itself of its responsibility. The real question still is whether, if she had gone to her own wharf, and the fire had occurred under the same circumstances, the vessel would have been liable for the loss. It was for the mutual advantage of the ship and the consignees that the cargo should be unloaded at the earliest possible moment—the ship, that she might discharge herself of responsibility and take on her return cargo—the consignees, that they might secure their goods as soon as possible. The North river piers in that neighborhood were all used by steamers engaged in the Liverpool trade. The pier selected was only six hundred feet from the regular pier of the line, and inquiry

<sup>1</sup> *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 359, 21 L. ed. 634; *The Aline*, 19 Fed. Rep. 875; *The Boskenna Bay*, 22 Fed. Rep. 662.

at that pier would doubtless have apprised libelants, or their agent, where the Egypt was actually discharging her cargo.

In addition to this there is a finding that, upon obtaining the permits for the immediate unloading of the cargo, the respondent's customhouse broker caused a notice of the time and place of discharge to be posted on a bulletin board in the customhouse; that it is usual to post such notice, and is not usual to publish them in the newspapers. It is true there was an exception taken to this finding upon the ground that there was no evidence in support of it. The testimony, however, of the witness, the customhouse broker, was to the effect that he attended to getting out the usual papers for the respondent company to allow the discharge and to passing all their steamers through the customhouse; that, on the arrival of the Egypt, the captain brought the manifest, took the usual oath, and made out applications for the usual permits to land goods, discharge at night, and to allow the goods to remain on the wharf. "We get the permit taken out, signed by the naval officer and collector, and after the permits are all taken out, we usually post a notice where the vessel will discharge (giving copy of notice). I have no reason to suppose the notice was not posted in this case. It is done in every case. I am not positive whether it was done in this case, but it is a part of the routine of entering a vessel to do so. I have no doubt it was done." The witness evidently had no definite recollection of this particular notice, but he had no doubt that he pursued his usual course in posting it. Respondent's agent also testifies that it was always usual to put up such notice at the customhouse. The customhouse broker for the libelants, Arnold, Constable & Company, testified in this connection that the invoice and bills of lading of the Egypt were sent down to him on January 31; that the entries were made and lodged in the customhouse at twenty-five minutes past two. "I knew where the board is where they put up notices of arrivals and the steamer's discharge. . . . That is around the corner going into the cashier's office. . . . It isn't any great distance. . . . I never look at that unless I want to find out where a vessel was discharged, a strange vessel; possibly I might look then; I have not looked there for years." While this

testimony, it is said, is not direct and positive to the fact sought to be proven, it creates, when aided by the ordinary presumption arising from the course of business, a strong probability that the notice was posted. The practice, even of a private office, if well established, is presumed to have been followed in individual cases, and is accepted as sufficient proof of the fact in question when primary evidence of such fact is wanting.<sup>1</sup> The conclusion of the court was justified by the evidence in this particular.

But, even supposing that actual notice had been given, it could not have been given before the arrival of the ship, and the names of the consignees were known, and it would then have been too late for the libelants to take their goods away. The findings are that the *Egypt* was entered at the customhouse at forty-five minutes past one in the afternoon; that she began to discharge her cargo at half-past four, and that libelants' merchandise was discharged prior to the fire. And that between the time of the arrival of the steamer and the destruction of the merchandise, there was not sufficient time in which to enter the libelants' goods at the customhouse, pay the duties thereon, and obtain the requisite permits for the removal of the same. If, then, it be true that libelants could not have removed their goods before the fire, it is difficult to see how the want of a notice could have contributed to the loss. The court is clearly of the opinion that, under the custom of the port and exigencies of the service, there was no obligation to delay the discharge of the cargo until notice could be given, and a reasonable time had elapsed before the goods could be taken away. While the nineteenth finding is to the effect that libelants had, before this consignment, received from the respondent company six other consignments under bills of lading in the same form, all of which were landed and discharged on their own pier, there is nothing to indicate that libelants took any steps whatever upon the faith of such previous practice, made any inquiries as to when the *Egypt* was expected, or at what pier she

<sup>1</sup> 1 Greenl. Ev. § 40; *Nicholls v. Webb*, 21 U. S. 8 Wheat. 326, 5 L. ed. 628; *Price v. Torrington*, 1 Salk. 285; *Champneys v. Peck*, 1 Stark. 404; *Pritt v. Fairclough*, 3 Campb. 305; *Doe v. Turford*, 3 Barn. & Ad. 890, 895; *Dana v. Kemble*, 19 Pick. 112.



would discharge her cargo. Indeed, while their own broker was at the customhouse attending to the entry of these goods, he did not even take the trouble to look at the bulletin to see where the Egypt was being discharged. If libelants had shown that, relying upon the previous practice, they were ready at pier No. 36 to receive the cargo, or were misled by the discharge at pier No. 39, they would have shown a much stronger title to recover. The inference is irresistible that, even if the Egypt had discharged at her own wharf, they would not have been there to receive, and could not have received their consignments, which would have been stored in the company's warehouse, and exposed to the same danger of fire—in other words, the delivery at the Inman did not in any legal sense contribute to the loss. There was no stipulation in the bill of lading that the Egypt would unload at No. 36, from which a duty to give notice, might be implied, if she were compelled to select another pier.

And the court conclude, that upon the facts of the case exhibiting a necessity for a discharge elsewhere than at her own pier, and in the absence of any evidence that libelants were prejudiced by the failure of the Egypt to discharge at her usual wharf, there was no breach of duty on the part of respondent in this particular. Another serious question, however, in that case was presented by the proviso in the application to allow the unpermitted cargo to remain upon the wharf, viz, that it should remain "at the sole risk of owners of said steamer, who will pay the consignee or owner the value of such cargo respectively as may be stolen, burned or otherwise lost, and who will also pay all duties on cargo which may be in any way lost by so remaining." It seems that upon the arrival of a transatlantic steamer, it is usual to apply for and obtain a general order to allow to be landed and sent to the public store (not the warehouse on the wharf) all packages for which no special permit or order shall have been received; also, a permit to allow such portion of the cargo as is unladen, but not permitted, to remain upon the wharf for forty-eight hours from the time of the granting of the above general order, at the expiration of which time they are sent to the proper general order store; and also a special license to permit the cargo to be unladen at

night. These orders, licenses, and permits are granted in pursuance of the general regulations of the Treasury Department. Granting that the request made by the company is, upon its face, broad enough to impose upon the company the responsibility for goods lost by fire, it must be construed in connection with the following stipulation upon the same subject in the bill of lading, viz: "The goods to be taken from alongside by the consignee immediately the vessel is ready to discharge. . . . The collector of the port being hereby authorized to grant a general order for discharge immediately after entry of the ship. The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so left by consignee will be at his or their risk of fire, loss or injury."

Some criticism is made upon the words "so left by consignee," libelants insisting that the word "left" implies a voluntary leaving of the cargo upon the wharf after notice of the discharge of the same has been received by the consignee. The court are not inclined, however, to affix to it such a technical meaning. In view of the fact that the object of the stipulation was evidently to exempt the carrier from responsibility for fire occurring at any time after the discharge of the cargo, and particularly during the forty-eight hours they were permitted to remain upon the wharf, which forty-eight hours, under the terms of the permit, began to run from the time of the general order to unload was granted, it is thought clear that it was intended to apply during this time, whether the goods were technically "left" by the consignee or not, and that the proviso should be interpreted as if it read: "The United States Treasury having given permission for goods to remain forty-eight hours on wharf at New York, any goods so remaining will be at consignee's risk of fire, loss or injury." This permission, though granted at the request of the ship owner and primarily for his benefit, is really in the view of the court of more value to the consignees, since a convenient opportunity is there afforded them to examine their goods, and they are saved the expense of cartage to a bonded warehouse and storage therein.

The court regard the question presented as substantially this:

A and B agree that in a certain contingency A shall assume the risk of the loss of his goods by fire. Subsequently B agrees with C, that, in precisely the same contingency, he shall be responsible to A for the loss of the same goods, and it disposes of it thus: waiving the question whether this means any more than that he shall be responsible so far as C is concerned, does the latter contract supersede the earlier? Unquestionably it would, if it were between the same parties. In this case, however, the first contract was made by B (the respondent) in full contemplation of the fact that it would be obliged to enter into the second, and for the special purpose of providing against it. Now, to say that, having entered into the first contract, knowing that it would have to enter into a second one wholly inconsistent with the first and intending to be bound by it, is scarcely creditable to the intelligence of its agent. Libelants, too, though parties, or rather privies to the first contract, were not parties to the second, and so far as it appears did not even know that it was or would be entered into, except as they may have known a general usage to protect officers in this manner. The position of the parties had not changed in the interval; no new consideration moved from the libelants; and while the contract was nominally made for their benefit, this gift of the collector was purely a voluntary one. Indeed, the contract seems really to have been for the protection of the collector himself. Under these circumstance it is clearly the duty of the court to harmonize these contracts, if it be possible to do so. It is by no means a universal rule that a person may sue upon a contract made for his benefit, to which he was not a party.<sup>1</sup> No case has gone so far as to hold that, where the person for whose benefit the contract is made, has himself or by his privy in estate entered into a contract inconsistent with this, he may repudiate such prior contract, and claim the benefit of the second simply because it has become for his interest to do so. There is no principle which authorizes one party to an agree-

<sup>1</sup> *Hendricks v. Lindsay*, 93 U. S. 143, 23 L. ed. 855; *Second Nat. Bank of St. Louis v. Grand Lodge F. & A. M.* 98 U. S. 123, 25 L. ed. 75; *Keller v. Ashford*, 133 U. S. 610, 33 L. ed. 667; *Cragin v. Lovell*, 109 U. S. 194, 27 L. ed. 903; *Willard v. Wood*, 135 U. S. 309, 34 L. ed. 210.

ment to vary it, even against his own interest without the consent of the other. As observed by the court of appeals of New York, in *Simson v. Brown*, 68 N. Y. 355: "It is not every promise made by one to another, from the performance of which a benefit may inure to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object and he must be the party intended to be benefited."<sup>1</sup>

The principle above announced was still further limited by the court of appeals in *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195, in which it is said that, to give a third party, who may derive a benefit from the performance of a promise an action, there must be—first, an intent by the promisor to secure some benefit to the third party; and, second, some privity between the two, the promisor and the party to be benefited, and some obligation or duty owing from the promisor to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent to him personally." It is necessary to a correct understanding of this contract to examine somewhat in detail the circumstances under which it was entered into, and the authority under which the collector acted in prescribing its terms. By Revised Statutes, sections 2867 and 2869, general authority is given to the collector to authorize the unloading of vessels arriving within the limits of their collection districts, and to grant a permit to land the merchandise. By section 2966 the collector is authorized to take possession of such merchandise, and deposit the same in bonded warehouses, and by section 2969 all merchandise of which the collector shall take possession under these provisions shall be kept with due and reasonable care at the charge and risk of the owner. By section 2871 the collector "upon or after the issuing of a general order" (for the unloading of the cargo) "shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is to say, between sunset and sunrise," upon a bond of indemnity being given, etc., "and any liability of the master or owner of any such steamship

<sup>1</sup> See also *Second Nat. Bank of St. Louis v. Grand Lodge F. & A. M. supra*; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am. Rep. 440.

to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license or of any general order, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed." There is certainly nothing here which contemplates that the owner of the vessel shall enter into any independent obligation, assuming new liabilities or expanding in any way existing liabilities, to the consignee. The object of the statute is clearly to preserve the *status quo*; to continue such liability as already exists and to preclude the ship owner from claiming that, by the action of the collector, his liability to the owner of the merchandise is impaired or restricted. In the language of the statute, any previous liability "shall not be affected," "but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed." It is true that no mention is here made of the power of the collector to allow the unpermitted cargo to remain forty-eight hours upon the wharf, and no such power is expressly given; but by section 2989 "the Secretary of the Treasury may from time to time establish such rules and regulations, not inconsistent with law, for the due execution of the provisions of this chapter, and to secure a just accountability under the same as he may deem to be expedient and necessary." While there is nothing in the statute allowing any fixed time to elapse between the unloading of the goods and their removal to a bonded warehouse, the statute does not prohibit such time being allowed, and as some interval must necessarily elapse for the examination and appraisalment of the goods designed for immediate delivery to the importer—duties which can most readily be performed while the goods are yet upon the wharf—and it is for the mutual benefit of the government and consignee to allow some such interval of time to elapse, the Secretary of the Treasury is doubtless vested with a certain discretion in that particular, under the power given him by section 2989, and also by section 251, which authorizes him to make rules and regulations not inconsistent with law in carrying out the provisions of law relating to raising revenue from imports.

In pursuance of this authority the Secretary of the Treasury,

on May 5, 1877, adopted certain regulations concerning the discharge of steamships, of which the following only is material: "Goods will be delivered from the docks by the inspector as fast as permits therefor are presented, and such as are discharged for which no permit has been received will be sent to the general order store. The collector may, at the request of the master, agent, or owner of the vessel, allow goods landed, but not 'permitted' to remain on the docks, at the sole risk of the owner of the vessel, not longer than forty-eight hours from the time of their discharge, upon the production of evidence that the owner of the vessel assumes the risk of the goods allowed to remain and agrees to pay the duties on any goods which may be lost by so remaining. This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods that may be lost, and must be signed by the owner of the vessel or his agent duly authorized. The consent of the collector thereto must also be granted in writing. At the expiration of the forty-eight hours, no permit having been received for their delivery by the inspector, the collector shall send the goods to the general order store to have the same weighed or gauged, if required."

In this connection it must be borne in mind that the Secretary of the Treasury is an officer of the government; that his powers are limited by law; that his duty is to protect the revenues of the government and to prevent smuggling or other illegal practices, whereby the government may be defrauded of its revenue; and that he owes no duty to individuals beyond seeing that their rights are not prejudiced any further than is necessary by the action of the customs officers. He is neither the agent of the vessel nor of the importer, but stands between them, representing only the government and charged only with the collection of its revenue. The above regulation, when carefully examined, is consistent with this view. It requires the collector to allow the goods to remain upon the docks "at the sole risk of the owner of the vessel," and requires the latter to assume "the risk of the goods allowed to remain," and to agree "to pay the duty on any

goods which may be lost by so remaining." It is obvious from the context that the risk referred to is the risk as between the owner of the vessel and the government, viz, the risk of paying duties upon such goods as may be lost during the forty-eight hours. The permit is granted primarily for the benefit and at the request of the vessel, which retains its lien for freight for the goods so long as they remain on the dock. The government has as yet no claim for duties against the consignee of the goods, and it is just that the owner of the vessel should assume the liability for duties. There is nothing here indicating an intention of imposing any liability upon the shipowner for the goods themselves, except so far as to protect the government from loss. The loss referred to is probably a loss by theft, to which these warehouses are peculiarly subject, since, if the goods were destroyed by fire, the consignee would, under section 2984, be entitled to an abatement or refund of duties. This construction of the shipowner's obligation is rather emphasized than otherwise by the subsequent clause of the regulation: "This request must be made in writing to the collector, and must state that if the permission is granted the goods will be at the risk of the owner of the vessel; that he will pay all duties on goods which may be lost, etc." The risk he thus assumes is the risk of paying the duties upon goods which may be lost. The court conclude that there is nothing in these instructions, interpreted in the light of the statute and of the powers of the collector, to justify the inference that it was intended to impose any new or different obligation upon the owner of the vessel, with respect to the consignee of the merchandise.

In the forms prescribed, probably by the department, to carry out these regulations, however, there is an apparent departure both from the language of the statute and the Treasury regulations, in the obligation the owner of the vessel is required to assume, "to pay to the consignee or owner the value of such cargo respectively as may be stolen, burned, or otherwise lost, and also pay all duties on cargo which may be in any way lost by so remaining." Here the obligation to indemnify the consignee first appears and occupies the most prominent place, and is extended

to goods stolen, burned, or otherwise lost, while the obligation to pay duties is mentioned rather incidentally than otherwise. Wherever, or by whomsoever these forms were prepared, the court say, it must, for the purposes of this case, treat them as the act of the collector, who if this contract be construed as intended for the protection of any one but the collector himself, clearly exceeded his authority in requiring the owner of the vessel to assume, as against the consignee, the risk of their being burned while upon the wharf. As the circuit court finds that "such application was in the form required by said collector, without which permit would not be granted, and the entire cargo would be sent to the public store," it cannot be treated as the voluntary act of the shipowner any further than the contract or obligation conformed to the requirements of the statute or Treasury regulations, which were designed, as has been already stated, only to preserve the previous rights of the consignee against the owner of the steamship unimpaired by the action of the collector. Beyond this it must be treated either as obtained by duress, or so plainly inconsistent with the previous agreement of the parties *inter sese* as to be of no avail to the consignee.

It is a familiar doctrine in the United States Supreme Court that a bond or other obligation extorted by a public officer, under color of this office, cannot be enforced, and the remarks of that court in the case of *United States v. Tingey*, 30 U. S. 5 Pet. 115. 8 L. ed. 66, are pertinent in this connection. In that case the Navy Department caused a form of bond, not prescribed by law, to be prepared and transmitted to one Deblois, a person to whom the disbursement of public moneys was intrusted as purser, to secure fidelity in his official duties, with a condition that it should be executed by him with sufficient sureties before he should be permitted to remain in office, or to receive the pay or emoluments attached to the office. "The substance of this plea," said the court, "is, that the bond, with the above condition, variant from that prescribed by law, was under color of office extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pre-



tense then to say that it was a bond voluntarily given, or that though different from the form prescribed by statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly then an illegal bond; for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law. That would be, not to execute, but to supersede the requisitions of law."

A distinction is drawn in this class of cases between a bond compulsorily executed, as in the case under consideration, and a bond or other obligation voluntarily given to the government for which there is no statutory authority. In this latter case the bond has been held to be valid.<sup>1</sup>

Upon the whole case the court states as its opinion: 1. That the stipulation in the bill of lading that respondent should not be liable for a fire happening after unloading the cargo was reasonable and valid. 2. That the discharge of the cargo at the Inman pier was not in the eye of the law a deviation such as to render the carrier an insurer of the goods so unladen. 3. That if any notice of such unloading was required at all, the bulletin posted in the customhouse was sufficient under the practice and usages of the port of New York. 4. The libelants, having taken no steps upon the faith of the cargo being unladen at respondent's pier, was not prejudiced by the change. 5. That the agreement of the respondent with the collector of customs to pay the consignee the value of the goods was not one of which the libelants could avail themselves as adding to the obligations of their contract with respondent.<sup>2</sup>

The facts that a vessel could not obtain a berth for the discharge of tea within the usual tea district in New York immediately upon arrival, and that she was also in need of certain repairs

<sup>1</sup> *United States v. Bradley*, 35 U. S. 10 Pet. 343, 358, 9 L. ed. 448, 454; *United States v. Hodson*, 77 U. S. 10 Wall. 395, 19 L. ed. 937.

<sup>2</sup> *Constable v. National SS. Co.* 154 U. S. 51, 38 L. ed. 903.

which made berthing in Brooklyn more desirable, do not justify her in departing from the established usage of unloading in New York, so as to throw upon the consignees the burden of extra expense caused by delivery in Brooklyn. Three or four instances of the delivery of cargoes of a certain character for the port of New York, in Brooklyn, upon arrangements for indemnifying the vessel for disregard of the long established custom to deliver in New York, do not show any such change of usage as to warrant delivery in Brooklyn except by consent.<sup>1</sup> The custom of the port, brought to the knowledge of the parties, may, in the absence of a special contract, vary the rule as to delivery on the wharf.<sup>2</sup> Where goods are delivered to a carrier marked for a particular place, without any directions as to their transportation or delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged,—whether the consignor knew of such usage or not.<sup>3</sup> But any practice at a particular locality, however general it may have become, has not the force of custom to release its merchants from the obligation of an ordinary bill of lading.<sup>4</sup>

Where there is an established custom to deliver at the wharf, with notice to owner of time and place of unloading, it is sufficient.<sup>5</sup> If there be no particular custom, the general usage of commerce applies.<sup>6</sup> Custom cannot alter a written agreement;<sup>7</sup> or change a contract which is clear and explicit.<sup>8</sup> A custom can-

<sup>1</sup> *Montgomery v. The Port Adelaide*, 38 Fed. Rep. 753.

<sup>2</sup> *The Tybee*, 1 Woods, 358.

<sup>3</sup> *Farmers & M. Bunk v. Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68, 18 Vt. 131, 16 Vt. 52, 42 Am. Dec. 491; *Van Sindercoord v. St. John*, 6 Hill, 157; *McMasters v. Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264.

<sup>4</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527-538, 16 L. ed. 177-181.

<sup>5</sup> *The Grafton*, Olcott, 43, Abb. Adm. 552, note; *Ostrander v. Brown*, 15 Johns. 39, 8 Am. Dec. 211; *Kohn v. Puckard*, 3 La. 224, 23 Am. Dec. 453.

<sup>6</sup> *Richardson v. Goddard*, 64 U. S. 23 How. 28, 16 L. ed. 412; *Gibson v. Stevens*, 3 McLean, 563; *Chaplin v. Rogers*, 1 East, 192; *Atkinson v. Maling*, 2 T. R. 462.

<sup>7</sup> *Porcell v. Thompson*, 80 Ala. 51.

<sup>8</sup> *Harrell v. Zimpleman*, 66 Tex. 292; *Larroice v. Lewis*, 44 Hun, 226; *Lamb v. Henderson*, 63 Mich. 302.

not prevail against a legal right.<sup>1</sup> The custom or usage which will control the interpretation of a contract must be one which is of general acceptance and prevalence.<sup>2</sup> The liability of a common carrier cannot be limited by a custom not brought to the notice of the party dealing with the carrier.<sup>3</sup> Under a charter party providing that cargo is to be discharged as fast as the vessel can deliver, she is entitled to discharge from two hatches in accordance with the practice of vessels of her size, without regard to a contrary custom of the port having reference to smaller vessels and smaller cargoes; and such right is not lost by not breasting out, where she is attended by lighters which could have taken from two hatches on the same side at the same time had they come together.<sup>4</sup>

The duty of the master of a vessel is to acquaint himself with the laws and customs of a country with which he was trading, and to conform his conduct to those laws and customs. He cannot defend himself under asserted ignorance, or erroneous information on the subject. Carriers are not liable, on their contracts of affreightment, for the loss by fire of goods, where they delivered the goods at the place chosen by the consignee, and where he agreed to receive them, and did receive a large portion of them, after full and fair notice. It is the habit of every nation to construe and apply its revenue and navigation laws with exactness, and every shipmaster engaged in a foreign trade must take notice of them. Where the master was informed of his duties upon his arrival and neglected to discharge them, suffering loss thereby, his loss can be attributed to nothing but inattention.

A delivery to a cartman without the orders of the consignee of goods or the delivery upon the wharf of goods carried coastwise has been held not to discharge the carrier even in a case of usage so to deliver.<sup>5</sup> If delivery by a common carrier is made to a

<sup>1</sup> *Sullivan v. Jernigan*, 21 Fla. 264.

<sup>2</sup> *Duling v. Philadelphia, W. & B. R. Co.* 66 Md. 120.

<sup>3</sup> *Little v. Fargo*, 43 Hun, 233; *Nicholas v. New York Cent. & H. R. R. Co.* 89 N. Y. 370.

<sup>4</sup> *The Glenfinlas*, 1 U. S. App. 22, 48 Fed. Rep. 758.

<sup>5</sup> *Ostrander v. Brown*, 15 Johns. 39, 8 Am. Dec. 211; *Mayell v. Potter*, 2 Johns. Cas. 371.

drayman, cartman or any other person not authorized by the consignee to receive it, it is at the risk of the carrier.<sup>1</sup>

Carriers, owners of the vessel, or charterers are responsible for the miscarriage of their master and agent. Their contract is an absolute one to deliver the cargo safely, the perils of the sea only excepted. Under such a contract, nothing will excuse them for a non-performance, except they have been prevented by some one of those perils, the act of libelants, or the law of the country. No exception of a private nature, not contained in the contract itself, can be an excuse for its non-performance.<sup>2</sup> A common carrier by water who receipts for goods marked for delivery at a private landing, cannot, without excuse or justification, deliver them at another landing without liability for damages so occasioned. And if such delivery is made with a willful purpose to harass and injure the owner, punitive damages may be recovered.<sup>3</sup> A memorandum or stamp upon the back of a bill of lading is insufficient to explain or to change it though the shipowner may have made it.<sup>4</sup> It is for the carrier to furnish the evidence to discharge itself for the failure to perform its contract.<sup>5</sup>

Where the consignee refuses to receive the cargo at the port of destination, the master is bound to land it at the place designated, and store it for the benefit of the shippers, it not being of a perishable nature, and cannot carry it to another port, nor sell it. The same is true if the consignee is dead, absent, or cannot be found.<sup>6</sup> When the goods, after being discharged upon the wharf and the different consignments properly placed, are not accepted by the consignee or owner of the cargo, the carrier should not

<sup>1</sup> *Dean v. Vaccaro*, 2 Head, 488, 75 Am. Dec. 744; *The Sultana v. Chapman*, 5 Wis. 454; *Williams v. Holland*, 22 How. Pr. 137; *Bartlett v. The Philadelphia*, 32 Mo. 256; *The Peytonia*, 2 Curt. 21; *Alabama & T. R. Co. v. Kidd*, 35 Ala. 209; *Hermann v. Goodrich*, 21 Wis. 543, 94 Am. Dec. 562.

<sup>2</sup> *Howland v. Greenway*, 63 U. S. 22 How. 491-503, 16 L. ed. 391-394.

<sup>3</sup> *Stricker v. Leathers*, 13 L. R. A. 600, 68 Miss. 803.

<sup>4</sup> *Brittan v. Barnaby*, 62 U. S. 21 How. 527, 16 L. ed. 177.

<sup>5</sup> *Howland v. Greenway*, 63 U. S. 22 How. 491-503, 16 L. ed. 391-394.

<sup>6</sup> *Arthur v. The Cassius*, 2 Story, 81; *Illinois Cent. R. Co. v. Friend*, 64 Ill. 303; *Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 505, 4 Am. Rep. 709; *Mayell v. Potter*, 2 Johns. Cas. 371; *Cope v. Cordova*, 1 Rawle, 203; *Stephenson v. Hart*, 4 Bing. 476; *Mordecai v. Lindsay* ("The Eddy") 72 U. S. 5 Wall. 481, 18 L. ed. 486.

leave them exposed on the wharf, but store them in a place of safety, and notify the consignee or owner that they are so stored subject to the lien of the ship for the freight and charges, and when he has done so, he is no longer liable.<sup>1</sup> It is the duty of a carrier, when the consignee is not ready to accept the freight, to unload and store it subject to his lien for freight charges, and not to subject him to a charge for demurrage by holding the vessel or cars in which it was transported for an unnecessary time.<sup>2</sup> When goods are not accepted by the consignee, the carrier should put them in a place of safety; and when he has done so, he is no longer liable on his contract of affreightment.

The duty of reasonable care for the preservation of property from loss, arises in all situations and in all emergencies.<sup>3</sup> It is in accordance with this general obligation that, in the absence of any special stipulation in the bill of lading, if a cargo be duly landed, on notice to the consignee at the port of destination, and the consignee fails to appear, or refuses to take the goods, the master can not abandon them, but is responsible for reasonable care of the goods, and must either hold them as bailee or store them on the shipper's account.<sup>4</sup> Where the stipulations of the bill of lading require the consignee to be present and receive the goods as soon as the vessel is ready to unload, and that they shall be at the consignee's risk as soon as landed on the dock, and the consignee is duly notified, and attends in order to accept the goods as landed, and takes more or less charge of them, the stipulation is held to exempt the ship from subsequent loss or damage.<sup>5</sup> In such cases, as the consignee has due notice of the discharge and accepts the goods, the duty of protecting the property is cast by the contract upon him, and the ship is relieved. Although goods may have

<sup>1</sup> *Mordecai v. Lindsay* ("The Eddy") *supra*; *Richardson v. Goddard*, 64 U. S. 23 How. 23, 16 L. ed. 412.

<sup>2</sup> *The Reuben Doud*, 46 Fed. Rep. 800.

<sup>3</sup> *Gaudet v. Brown*, L. R. 5 P. C. 135; *The Spartan*, 25 Fed. Rep. 44.

<sup>4</sup> *Richardson v. Goddard*, 64 U. S. 23 How. 39, 16 L. ed. 416; *The Grafton*, 1 Blatchf. 173, 175; *Redmond v. Liverpool, N. Y. & P. S. B. Co.* 46 N. Y. 578, 7 Am. Rep. 390; *McAndrew v. Whitlock*, 52 N. Y. 40, 46, 11 Am. Rep. 657; *The City of Lincoln*, 25 Fed. Rep. 839.

<sup>5</sup> *The Santee*, 2 Ben. 519, 7 Blatchf. 186; *Willis v. The City of Austin*, 2 Fed. Rep. 412; *The Kate*, 12 Fed. Rep. 881.

been delayed unnecessarily in their carriage and their market value may have been impaired, the consignee cannot refuse to receive them, unless a previous demand and refusal by the carrier to deliver them has been made;—but the shipper may have his action for the loss sustained through the delay.<sup>1</sup> The consignee cannot, after notice of the arrival of property for him, defer taking it away because he has other business engagements to which he gives a preference.<sup>2</sup> The delay of the consignee in receiving the goods or his refusal, within the time fixed, will not excuse the carrier from injury to them, if he casts them away and leaves them where they will be open and exposed to injury from the elements.<sup>3</sup> Nor will refusal of a consignee, under a mistake, to receive goods from a carrier, prejudice its right to claim them from the carrier, if no intervening rights have accrued.<sup>4</sup>

If the owner accepts the goods in a bill of lading he is presumed to pay for the stipulated freight and receive the goods within a reasonable time, or within the agreed time, or else pay what the bill of lading requires for the delay. To avoid responsibility for any unreasonable delay in the acceptance of goods, the owner and holder of the bill of lading must either refuse acceptance or find some other person who both as vendee of the goods and as assignee and holder of the bill of lading becomes substituted in his place and to his rights and liabilities, through direct relations to the representative under and by virtue of the bill of lading.<sup>5</sup> The peculiar circumstances and environment of a consignee, and the distance of his residence from a railroad depot, cannot be considered in determining what is a reasonable time for him to take away goods. Three days is a reasonable time for a consignee to take a piano and stool away from a depot, where it has been shipped by one continuous line a comparatively short distance.<sup>6</sup>

<sup>1</sup> *Cincinnati, I. St. L. & C. R. Co. v. Case*, 122 Ind. 310; *Davis v. Garrett*, 6 Bing. 716; *Hawkins v. Hoffman*, 6 Hill, 586. 41 Am. Dec. 767; *Scovill v. Griffith*, 12 N. Y. 509; *Black v. Barendale*, 1 Exch. 410; *Bodley v. Reynolds*, 8 Q. B. 779; *Beckwith v. Frisbie*, 32 Vt. 559.

<sup>2</sup> *Hedges v. Hudson River R. Co.* 49 N. Y. 223.

<sup>3</sup> *Scheu v. Benedict*, 116 N. Y. 510; *Cook v. Erie R. Co.* 58 Barb. 312.

<sup>4</sup> *Bacharach v. Chester Freight Line*, 133 Pa. 414.

<sup>5</sup> *Neilsen v. Jesup*, 30 Fed. Rep. 138.

<sup>6</sup> *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

But a railroad company was acquitted of negligence contributing to an accident to its train from lumber blown upon a track from a car which it had left the day before upon a side track to be unloaded by the consignee, and which was left in a dangerous condition through the negligence of the latter, in failing to superintend the unloading or to watch the car or its track at night.<sup>1</sup> Where ice dealers in Baltimore purchased ice to be delivered on board "The Kennebec River" the sellers agreeing to procure the vessel and the purchasers to pay the freight, the latter were liable in an action *in personam* for damages for unreasonable detention of the vessel on arrival in Baltimore, before the discharge of the ice was commenced.<sup>2</sup>

A condition in a bill of lading by which the consignee agrees to be ready to receive his goods when the ship is ready to unload, that in default thereof the ship may land, warehouse, or place them in a lighter without notice, immediately, at his risk and expense, after the goods leave the deck of the ship, exempts the ship from the duty of giving him any notice, but not from the duty of exercising reasonable care to discharge them at a suitable place.

It is not unlawful to stipulate, in a bill of lading which requires a ship to use reasonable care in discharging goods at a proper time and place, that no notice of discharge need be given to the consignee.<sup>3</sup> Consignees of a cargo of rags under a bill of lading allowing the master to discharge into lighters or warehouse them in case such consignees are not ready to receive them cannot be relieved from the expense of lighterage for a time during which the rags remained upon the lighters, pending preliminary actions to obtain permits from the proper officials to effect the removal and storage of the rags. Under a bill of lading of rags providing that the consignee is bound to be ready to receive them, and in default the master or agent may enter the goods at the custom-house, and "land, warehouse, or place them in lighter without

<sup>1</sup> *New York, L. E. & W. R. Co. v. Atlantic Ref. Co.* 129 N. Y. 597, 49 Am. & Eng. R. Cas. 131.

<sup>2</sup> *The Wm. Marshall*, 29 Fed. Rep. 328.

<sup>3</sup> *Rolfe v. The Boskenna Bay*, 6 L. R. A. 172, 40 Fed. Rep. 91.

notice to, and at the risk and expense of, the said consignee' after they leave the dock of the ship, and giving a lien for any charges stipulated to be borne by the owners of the goods,—the master is justified in discharging the goods into lighters, where the health regulations at the port of discharge forbid unloading upon the dock with the rest of the cargo; and such discharge constitutes legitimate delivery entitling the ship to recover the expenses of lighterage, which cannot be reduced on the ground that the rags should have been immediately forwarded to a warehouse so as to reduce the expense to a minimum.<sup>1</sup>

### § 145. *Demurrage.*

Demurrage, technically, so called, is founded upon some contract entered into between the consignor or freighter, and ship owner, which, under certain circumstances, is held assumed by the consignee. A delay beyond the time designated in the contract gives a cause of action in favor of the ship owner. Although it is said to be a claim in the nature of freight, yet it is perfectly distinct and separate therefrom. While a consignee, by accepting the goods consigned to him under a bill of lading, by which the person receiving the goods is to pay freight, is held bound by an implied contract to pay the freight; yet, unless the bill of lading, either by itself or by reference to another instrument, contains an express condition providing for the payment of demurrage, the consignee in simply accepting the goods will not be liable for the payment thereof.<sup>2</sup> At the same time, while not strictly liable for demurrage,<sup>3</sup> yet a consignee of the cargo who is also the owner thereof may be liable for damages in the nature of demurrage when the vessel is detained through the fault of the consignee an unreasonable length of time at the port of discharge.<sup>4</sup>

<sup>1</sup> *Knott v. 100 Bales of Rags*, 60 Fed. Rep. 634.

<sup>2</sup> *Iesson v. Solly*, 4 Taunt. 52; *Brincker v. Scott*, Id. 1; *Evans v. Foster*, 1 B. & Ad. 118, 20 E. C. L. 420; *Van Etten v. Newton*, 134 N. Y. 143.

<sup>3</sup> But see *ante*, section 54, page 218, note 1.

<sup>4</sup> *Dayton v. Parke*, 142 N. Y. 391; *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Scholl v. Albany Iron Co.* 101 N. Y. 602.



It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customers, any reasonable regulation for the conduct of its business, the purpose and effect of which are the protection of the carrier and the benefit of the public. A regulation as to the time within which vehicles may be unloaded free of any expense for storage, and fixing a reasonable rate per day at which storage will thereafter be charged for the use of such vehicles so long as they remain unloaded falls clearly within the scope of this power. It seeks to prevent the diversion and detention of cars from the legitimate work of transportation, as well as to secure compensation for service not otherwise paid for, by prescribing, in cases where by contract or custom the carrier is under no duty to unload the cars, but they are to be unloaded by the customer, a rate *per diem* in the nature of a charge for storage, to begin at a certain time after the cars have been delivered to the customer or placed at his disposal for unloading. Such regulation cannot be regarded as unreasonable so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive. The law compels the carrier to receive the goods of the public, and to transport and deliver them within a reasonable time. To do this it is necessary that the means of transportation shall be under the carrier's control, and that, after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely, and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic, or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks,

and the obstruction in a greater or less degree of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general and the people at large must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.

The carrier, in addition to its compensation for carriage of goods, has the right to charge for their storage and keeping, as a warehouseman, after reasonable opportunity has been afforded the owner to remove them.<sup>1</sup> And, where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse. There is no law which inhibits the use of cars for this purpose, or which requires unloading and removal of the goods to some other structure before any charge for storage can attach. This method of storage may in many cases be as effectual as any other. Indeed, it may serve the customer's interest and convenience much better to have the car placed at his own place of business, where he may unload it himself, or where it may be unloaded by purchasers as the goods are sold, thus saving drayage and other expenses, than to have it unloaded by the carrier, and the goods stored elsewhere at the customer's expense. And a customer whose duty it is to unload, and who, failing to do so within a reasonable time, accepts the benefit of storage in a car, by requesting or permitting the carrier to continue holding it unloaded in his service, and subject to his will and convenience as to the time of unloading, cannot be heard

<sup>1</sup> *Southwestern R. Co. v. Felder*, 46 Ga. 433.

to complain of the method of storage, and to deny the right to any compensation at all for this service, on the ground that some other method was not resorted to. He may insist that the rate fixed shall not be unreasonable or excessive, but the law cannot be invoked to declare that no compensation whatever shall be charged for such extra service.

It has been contended that "demurrage" is allowed only in maritime law, and cannot be demanded by a railroad company in the absence of a stipulation therefor in the bill of lading; and in support of this view the cases of *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, and *Burlington & M. R. Co. v. Chicago Lumber Co.*, 15 Neb. 391, are cited. In the former of these cases it is said: "The right to demurrage, if it exists as a legal right, is confined to the maritime law, and only exists as to carriers by seagoing vessels. But it is believed to exist alone by force of contract. All such contracts of affreightment contain an agreement for demurrage in case of delay beyond the period allowed by the agreement, or the custom of the port allowed the consignee to receive and remove the goods. But the mode of doing business by the two kinds of carriers is essentially different. Railroad companies have warehouses in which to store freights; owners of vessels have none. Railroads discharge cargoes carried by them; carriers by ship do not, but it is done by the consignee. The masters of vessels provide in the contract for demurrage, while railroads do not; and it is seen that these essential differences are, under the rules of the maritime law, wholly inapplicable to railroad carriers." The decision in the Nebraska case does not go into any discussion of the question, but merely cites and follows the holding of the Illinois court. But the reasoning is inconclusive. There is no satisfactory reason why carriers by railroads should not be entitled to compensation for the unreasonable delay or detention of their vehicles as well as carriers by sea. What has been already said, is a sufficient answer to the reason assigned, that railroads have warehouses in which to store freights. And the reason that "railroads discharge cargoes carried by them," and "carriers by ship do not, but it is done by the consignee," of course cannot operate as to the cases provided for

by a rule, which by its terms applies only where the unloading is to be done by the owners of the property. Nor is it settled that the right to demurrage in maritime law exists only by express contract. In this country the courts have repeatedly declined to follow the rulings of the English common law courts on this subject, and have held that the shipowner has a lien upon the cargo for demurrage, notwithstanding the absence of any stipulation therefor in the bill of lading.<sup>1</sup>

But the adoption by a railroad company of the term "demurrage" as a designation for this charge does not require a resort to that law as a standard for testing the validity of the rule. It is proper to look to the real substance and effect of the rule, rather than to analogies suggested by the technical designation which the carrier may see fit to adopt. To conclude that, because the conditions of carriage by sea are different, no charge under this name can be enforced by a carrier by land, or that, if allowed, it must be governed by the rules of the marine law, would be to adopt a narrow and merely technical view, ignoring well recognized grounds of public policy and the right of the carrier to prescribe reasonable rules and regulations for its own safety and the benefit of the public. The instances are few in which regulations similar to the one in question have been passed upon by the courts. The only cases found in which the right of a railroad company to make a charge of this kind is denied are the ones above referred to. On the other hand, the right is sustained by the supreme court of Massachusetts.<sup>2</sup> See also a full and able discussion of the question by Toney, J., of the law and equity court of Louisville, Ky.<sup>3</sup>

It cannot, as matter of law, be said that the rate of one dollar per day for each car is unreasonable. It is not necessarily unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day. Nor are the customary rates

<sup>1</sup> 5 Am. & Eng. Enc. Law, title, *Demurrage*, p. 546; Port. Bills of Lading, § 356. See also *Huntley v. Doucs*, 55 Barb. 310, and *Haugood v. 1310 Tons of Coal*, 21 Fed. Rep. 681, and cases there cited.

<sup>2</sup> *Miller v. Mansfield*, 112 Mass. 260.

<sup>3</sup> *Kentucky Wagon Mfg. Co. v. Louisville & N. R. Co.* (Ky.) 11 Ry. & Corp. L. J. 49, note.

for storage in warehouses and elevators the measure of compensation where the storage is in the cars on the tracks of a railroad. Indeed, if it be a legitimate object of such a rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use when detained as a means of storage should not be such as to encourage customers to adopt that means, instead of the more regular and usual methods. As between the carrier and customers who have notice of the regulation before shipments are made, the regulation is operative, whether indicated upon bills of lading or not, and whether the shipments are made to the order of the consignor, with the customary direction to notify the customer, or directly to the customer himself. In construing the phraseology of a regulation expressed in this language: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage, and that, when the period for such demurrage charge commences, they are to remain accessible to the consignee for unloading purposes,"—the course and exigencies of business are necessarily to be regarded; and hence the cars, after their arrival at destination, though not kept accessible at every moment of time, are to be treated as being and remaining accessible if the carrier is always ready to render them so within the shortest practicable time—not longer than a few hours—after being notified that the customer is ready to unload.<sup>1</sup>

A reasonable charge for improper delay in unloading cars is not one for transportation, storage, or delivery of freight within Va. Code 1887, §§ 1202, 1203, which provide that no charge other than that provided by law shall be made. A charge to a consignee of \$1 per day after three days, for every car remaining unloaded after notice of arrival, is not unreasonable.<sup>2</sup> The refusal of a carrier after payment of freight and offer of customary switching charges, to switch cars to a connecting line for delivery at the coal yard of the consignee, whose financial responsibility is

<sup>1</sup> *Miller v. Georgia R. & Bkg. Co.* 18 L. R. A. 323, 88 Ga. 563.

<sup>2</sup> *Norfolk & W. R. Co. v. Adams* (Va.) 22 L. R. A. 530.

not questioned, unless he promises in advance to pay any demurrage charges that may be made, regardless of their unreasonableness, will render the carrier liable for damages to him, although he had previously refused to pay such charges on other cars.<sup>1</sup>

It is the duty of a carrier, when the consignee is not ready to accept the freight, to unload and store it subject to his lien for freight charges, and not to subject him to a charge for demurrage by holding the vessel of carrier in which it was transported for an unnecessary time.<sup>2</sup> A vessel delivering her cargo is not bound to look beyond the owner and holder of the bill of lading for demurrage, because he has the right to control the delivery and acceptance of the goods under it.<sup>3</sup> The control of the discharging of a vessel is given the consignee so as to render him liable for damage for delay in furnishing a berth, under a bill of lading providing that there shall be allowed one day for every 75 tons of cargo forty-eight hours after arrival and notice to the consignee, after which demurrage shall be payable; and that after arrival and notice the vessel shall have precedence in discharging over all vessels arriving and giving notice after her arrival.<sup>4</sup> After demurrage begins to run, under and pursuant to the terms of a charter party, Sundays are not to be deducted.<sup>5</sup>

Consignees who by the terms of the charter party are to pay the freight are liable for demurrage for failure to have ready for discharge a particular dock at which the charter party provides the cargo shall be unloaded with customary despatch,—especially where they are the real owners.<sup>6</sup> In the absence of any provision in a bill of lading fixing a time for unloading, the merchant's or consignee's obligation to unload is to use all reasonable diligence under the circumstances; and demurrage will not run during a delay for which he was in no way respon-

<sup>1</sup> *Macloon v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>2</sup> *The Rueben Doud*, 46 Fed. Rep. 800.

<sup>3</sup> *Neilsen v. Jesup*, 30 Fed. Rep. 138.

<sup>4</sup> *Smith v. New York & M. Granite Pav. Block Co.* 56 Fed. Rep. 527, affirming 56 Fed. Rep. 525.

<sup>5</sup> *Baldwin v. Sullivan Timber Co.* 142 N. Y. 279.

<sup>6</sup> *Dayton v. Parke*, 67 Hun, 137.

sible, caused by a general strike of lightermen.<sup>1</sup> A charterer is not liable for demurrage for delay in delivering the cargo at the port of loading, owing to an extraordinary drought affecting the rivers and streams from which it was to be obtained, where he had purchased the cargo, and the charter party provides that a certain number of working days are allowed him for actual delivery of cargo alongside, and that in the computation of the days for delivering the cargo time lost by reason of drought shall be excluded.<sup>2</sup> A vessel which is to wait her turn with other vessels coming to the same consignee, who, upon arrival, asks if there is any chance for a berth, and is informed that the consignee will give information when there is, is justified in waiting for a berth until such information is received.<sup>3</sup> Demurrage for a vessel disabled by a collision at a time when she was chartered for all but one day of the time she was disabled is to be computed at the net value of her charter parties, where other vessels of the same owner took her place, and not at the fair market value of her use during such time.<sup>4</sup> A consignee of goods who refuses to receive them because of the carrier's delay in transporting them cannot be charged with demurrage and storage fixed by a rule of which he has no notice and which relates to cases of prompt delivery and failure of the consignee to unload the car.<sup>5</sup> A vessel is liable for the value of a cargo, less only the freight charges, where, upon an ordinary contract of affreightment, the master refuses to deliver the cargo except upon payment of an extortionate demand for demurrage, and the consignee has abandoned it to the ship, although a tender of the amount actually due is not made until some time after the arrival of the vessel.<sup>6</sup>

In order to hold bona fide indorsees of bills of lading liable for the rates contracted by the charter, the master, when he signs the bills presented by the charterer, making the goods deliverable to

<sup>1</sup> *Hick v. Rodocanachi*, 65 L. T. N. S. 300, 44 Alb. L. J. 462.

<sup>2</sup> *Sorensen v. Keyser*, 48 Fed. Rep. 117.

<sup>3</sup> *Smith v. New York & M. Granite Pav. Block Co.* *supra*.

<sup>4</sup> *The Emma Kate Ross*, 46 Fed. Rep. 872.

<sup>5</sup> *Baumbach v. Gulf, C. & S. F. R. Co.* 4 Tex. Civ. App. 650.

<sup>6</sup> *The Reuben Doud*, 46 Fed. Rep. 800.

order, must insert either the charter rates of demurrage, or some clause adopting the charter's provisions. Where the bill of lading makes no reference to any charter, and the indorsee has no notice of it, the bill is the only contract which the shipper can legally set up against him, whether he sues for demurrage *in personam* or *in rem*. So far as respects demurrage, the indorsee and purchaser of goods has a right to rely on the bill of lading as the only contract between him and the ship, and cannot be held to the terms of a charter of which he had no notice.<sup>1</sup>

The ship's responsibility for demurrage claimed on the alleged transfer of the cargo, must be brought home to the libellant where the respondents were dealt with as owners in authority.<sup>2</sup> In cases of collision demurrage will be allowed for detention of the injured boat while undergoing repairs.<sup>3</sup> Demurrage will not be allowed on account of the position in which a vessel was placed at the wharf—although it seriously retarded work,—where it was not in accordance with the custom of the port.<sup>4</sup> Where a consignee who has to provide a wharf is not given reasonable notice of the time when a vessel will unload, demurrage is allowed only after the lapse of a reasonable time after notice was actually given.<sup>5</sup> A libel having been filed, claiming freight and demurrage under a charter party, the libellant thereafter filed a supplemental libel setting up the same and additional facts and claiming the same freight and demurrage and additional demurrage. It was ruled that as this additional demurrage arose from the breach of the charter party, set up in the original libel, there was no reason why such demurrage should not be recoverable in this action, although such demurrage occurred after the filing of the original libel, and that the course pursued in this case, if not strictly regular, tended to save trouble and expense.<sup>6</sup>

<sup>1</sup> *The Pietro G.* 39 Fed. Rep. 366.

<sup>2</sup> *The Elida*, 31 Fed. Rep. 420.

<sup>3</sup> *The Favorita v. Union Ferry Co.* 85 U. S. 18 Wall. 598, 21 L. ed. 856; *Williamson v. Barrett*, 54 U. S. 13 How. 101, 14 L. ed. 68; *The Cayuga v. Hoboken Land & Imp. Co.* 81 U. S. 14 Wall. 270, 20 L. ed. 823; *The Potomac v. Cannon*, 105 U. S. 630, 26 L. ed. 1194.

<sup>4</sup> *The Elida*, *supra*.

<sup>5</sup> *The Rockey City*, 33 Fed. Rep. 556.

<sup>6</sup> *Weil v. Calhoun*, 23 Fed. Rep. 872.



### § 146. *When Liable only as Warehouseman.*

While goods are in course of transportation, and necessarily deposited in a warehouse as an incident to their forwarding, they are held under the responsibility of the common carrier, and not under that of the warehouseman. This distinction is to be borne in mind, that while *en route*—though deposited in a warehouse—goods are held under the responsibility of the carrier; but, when they arrive at their destination, and a reasonable time has been afforded the consignee to remove them, on his failure to do so, their deposit in a warehouse carries with it only the obligation resting upon the warehousemen.<sup>1</sup>

If the carrier act as warehouseman, forwarder or wharfinger, for promoting his regular and chief business as carrier, he is liable in the latter capacity from the moment he receives goods for transportation. It is a delivery to him as carrier, and not as warehouseman, wharfinger or forwarder. If the carrier really combines the two independent employments and the one is not incident to the other, the question as to which character the goods were received in is one of fact.<sup>2</sup>

Where personal property in transit is by express direction of the consignee stored in a warehouse of the carrier subject to the call of a transfer company, the liability of the carrier is reduced to that of an ordinary bailee.<sup>3</sup> A railway company to which goods are delivered for transportation, without more, assumes the liability of a carrier; but, if the delivery is for storage for a certain or indefinite time, the carrier becomes a mere depositary or bailee until the appointed time has expired.<sup>4</sup> A railway com-

<sup>1</sup> *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 327, 21 L. ed. 302.

<sup>2</sup> *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 252, 12 Am. Rep. 494; *Schloss v. Wood*, 11 Colo. 287; *Wade v. Wheeler*, 3 Lans. 201; *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 Am. Dec. 626; *Stannard v. Prince*, 64 N. Y. 300; *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Moses v. Boston & M. R. Co.* 24 N. H. 71, 55 Am. Dec. 222; *Rogers v. Wheeler*, 52 N. Y. 262; *Fitchburg & W. R. Co. v. Hanna*, 6 Gray, 539, 66 Am. Dec. 427; *Ackley v. Kellogg*, 8 Cow. 223; *Platt v. Hibbard*, 7 Cow. 497; *Brown v. Dennison*, 2 Wend. 593.

<sup>3</sup> *Hartman v. Louisville & N. R. Co.* 39 Mo. App. 88.

<sup>4</sup> *Gregory v. Wabash R. Co.* 46 Mo. App. 574.

pany's liability for a carload of lumber burned on one of its side tracks is that of a warehouseman or bailee, and not of a common carrier, where the intending shipper, after loading the lumber on the car, which was pointed out to him by a freight agent, did not notify the company of its readiness for transportation or of the consignee.<sup>1</sup> Where goods are deposited with the carrier, subject to the future orders of the owners, the liability assumed is that only of a warehouseman.<sup>2</sup> Ordinarily a common carrier accepting goods to be carried beyond his line by a distinct conveyance, will lose his character as a common carrier when he deposits them in his warehouse. He then becomes a mere warehouseman undertaking for their future transportation.<sup>3</sup> If the goods are detained at the request of the shipper, pending such detention the liability is that of a warehouseman only.<sup>4</sup> But it has been held that it is within the apparent scope of of an express agent's authority to make an arrangement with the consignee of a trunk, before the payment of charges and the signing of the receipt therefor, to leave it in the express office until the next day, with a view to giving him a reasonable time to send for the trunk; and such arrangement will bind the company in the absence of notice to the consignee of any restriction on the agent's authority.<sup>5</sup>

After goods have arrived at their destination, the carrier is liable only where negligence is shown.<sup>6</sup> Warehousemen are only bound for reasonable care.<sup>7</sup> On the other hand a presumption of

<sup>1</sup> *Basnight v. Atlantic & N. C. R. Co.* 111 N. C. 592.

<sup>2</sup> *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515; *Judson v. Western R. Corp.* 4 Allen, 520, 81 Am. Dec. 718; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126; *Pittsburg, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448.

<sup>3</sup> *Ackley v. Kellogg*, 8 Cow. 223; *Garside v. Trent & M. Nav. Proprs.* 4 T. R. 581.

<sup>4</sup> *St. Louis, A. & T. H. R. Co. v. Montgomery*, 39 Ill. 335; see *Watts v. Boston & L. R. Corp.* 106 Mass. 466.

<sup>5</sup> *Oderkirk v. Fargo*, 61 Hun. 418.

<sup>6</sup> *Mitchell v. Lancashire & Y. R. Co.* L. R. 10 Q. B. 256, 44 L. J. Q. B. 107; *Bourne v. Gatliffe*, 7 Man. & G. 850, 11 Clark & F. 45; *Chapman v. Great Western R. Co.* 49 L. J. Q. B. 420, L. R. 5 Q. B. Div. 278; *Re McLaren*, 48 L. J. Bk. 49; *Garside v. Trent & M. Nav. Proprs. supra*; *Crouch v. Great Western R. Co.* 27 L. J. Exch. 345; *Heugh v. London & N.W. R. Co.* L. R. 5 Exch. 51.

<sup>7</sup> *Searle v. Laverick*, L. R. 9 Q. B. 122; *Abbott v. Freeman*, 35 L. T. N. S. 783.

negligence will exist where the usual course has been changed and injury results, or a change in the condition of the premises has occurred.<sup>1</sup> Although the liability of a transportation company as an insurer ceases upon arrival of the freight at the depot, it becomes responsible thenceforward under its contract as warehouseman, for a want of proper care in the delivery of the freight.<sup>2</sup>

A carrier is a servant of commerce, and is protected under constitutional provisions for the regulation of commerce in the discharge of all the duties of a carrier recognized by the law. Regulations of commerce reach him while he is in the discharge of duties pertaining to commerce. When he ceases to be a carrier he is beyond the protection provided by regulations for commerce. If he ceases to be a carrier and becomes a warehouseman, he cannot be protected as a carrier. In *State v. Creeden*, 7 L. R. A. 298, 78 Iowa, 556, the shipment of liquor had been received at the place of destination from six to fifteen days prior to the seizure, and was kept in the railroad freight house, or warehouse used for storing freight transported or for transportation upon the railroad. It was said it is a familiar rule of the law that upon the arrival of freight at the place of destination, and its deposit in the carrier's warehouse, his responsibility as carrier ceases. He becomes, as to the freight and the consignor and consignee, a warehouseman.<sup>3</sup> If, after inquiry, the consignee or indorsee of a bill of lading for delivery to order, cannot be found, the carrier must retain the goods till claimed or store them on account of the owner, and he will not be excused for delivery to the wrong person.<sup>4</sup> The legal duty of carriers is not fully discharged by

<sup>1</sup> *Byrne v. Boadle*, 2 Hurlst. & C. 722, 33 L. J. Exch. 13; *Shepherd v. Midland R. Co.* 25 L. T. 879, 20 Week. Rep. 705; *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 759; *Nicholson v. Lancashire & Y. R. Co.* 34 L. J. Exch. 84, 3 Hurlst. & C. 534; *Scott v. London Dock Co.* 34 L. J. Exch. 220, 3 Hurlst. & C. 596; *Crafter v. Metropolitan R. Co.* L. R. 1 C. P. 300, 35 L. J. C. P. 132; *McMahon v. Davidson*, 12 Minn. 357.

<sup>2</sup> *Merchants Despatch & T. Co. v. Merriam*, 111 Ind. 5; *Independence Mills Co. v. Burlington, C. R. & N. R. Co.* 72 Iowa, 535.

<sup>3</sup> *Francis v. Dubuque & S. C. R. Co.* 25 Iowa, 60, 95 Am. Dec. 769; *Mohr v. Chicago & N. W. R. Co.* 40 Iowa, 597, 2 Am. & Eng. Enc. Law, 881; Angell, Carriers (5th ed.) § 304.

<sup>4</sup> *The Thames v. Seaman*, 81 U. S. 14 Wall. 98, 20 L. ed. 804.

receiving on and discharging from their cars, livestock at a depot, access to which must be purchased. Carriers cannot make the yards of a certain company their exclusive stock depot at a certain place, there being other stockyards near by, and charging lower rates.<sup>1</sup> If the connecting line will not receive them, the carrier may, after a reasonable time, store them, and then be liable only as warehouseman.<sup>2</sup>

Where a railway company engaged in carrying cars from the tracks of railroad companies to elevators and other places of business, and returning the cars to the proper company, received two flat cars loaded with coal to deliver to the consignee over whose private track it had no control, when it had run the cars upon such private track, its liability as an insurer ceased, and it is not liable for the accidental burning of the cars before their return.<sup>3</sup>

A carrier is liable for goods lost by misdelivery, and it is unimportant, as affecting his liability, whether the misdelivery occurs through mistake, fraud, or imposition practiced upon the carrier—such misdelivery amounting to conversion.<sup>4</sup> Where goods are consigned to a firm which has no existence, so that delivery cannot be made to the consignees, it is the duty of the carrier to warehouse the goods for the owner, to whom the carrier is liable for the goods if it delivers them to a stranger without making any inquiry as to his identity and authority.<sup>5</sup> But, where the character of carrier had ceased, by reason of their inability as carriers to deliver the goods—without their fault—and the relation imposed upon them by law is that of a warehouseman having the goods in their hands as involuntary bailees—without their own default—a misdelivery will not amount to conversion as a

<sup>1</sup> *Keith v. Kentucky Cent. R. Co.* 1 Inters. Com. Rep. 601.

<sup>2</sup> *Nutting v. Connecticut River R. Co.* 1 Gray, 502; *Rawson v. Holland*, 59 N. Y. 611, 18 Am. Rep. 394.

<sup>3</sup> *East St. Louis & C. R. Co. v. Wabash, St. L. & P. R. Co.* 123 Ill. 594.

<sup>4</sup> *Little Rock, M. R. & T. R. Co. v. Glidewell*, 39 Ark. 487; *Scheu v. Erie R. Co.* 10 Hun, 498; *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116; *Nebenzahl v. Fargo*, 15 Daly, 130; *McCulloch v. McDonald*, 91 Ind. 240; *Forbes v. Fitchburg R. Co.* 133 Mass. 154; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Devereux v. Barclay*, 2 Barn. & Ald. 702; *Harokins v. Hoffman*, 6 Hill, 586, 41 Am. Dec. 767; *Duff v. Budd*, 3 Brod. & B. 177; *Claffin v. Boston & L. R. Co.* 7 Allen, 341.

<sup>5</sup> *Sword v. Young*, 89 Tenn. 126, 129.

matter of law; but the question will be one for the jury, whether as warehousemen, they have exercised reasonable and proper caution and care, the responsibility for misdelivery being no longer that of an insurer, but that of an ordinary bailee, bound to exercise reasonable care and caution.<sup>1</sup> In its character as such bailee, where its relation of carrier has ceased, no liability will be incurred where—without its fault—goods are lost through any defect in the package or casing of the goods;<sup>2</sup> or from the dangerous quality of the goods;<sup>3</sup> or through robbery or theft;<sup>4</sup> nor for the loss of goods,<sup>5</sup> or other damage;<sup>6</sup> or where they are destroyed by an accidental fire, while detained, awaiting the action of custom-house officers;<sup>7</sup> or in storage.<sup>8</sup>

A railroad corporation is not chargeable, as warehouseman, with the loss of goods deposited in its depot, which are destroyed by fire, in the absence of evidence as to the company's negligence or want of ordinary care, or some wrong or dereliction of duty on its part.<sup>9</sup> But where goods shipped by railroad were detained several days, after arrival at the place of destination, in the company's depot, and were then transferred to the store of careful and responsible warehousemen and no notice was received by the consignee of the transfer to the warehouse, and after such transfer, the consignee was informed, upon inquiry at the railroad office, that the goods had not arrived, and subsequently, the goods were destroyed by the burning of the warehouse, it was thereupon held, that the carrier was responsible for the direct results of the false information given by its employe, and the jury having found

<sup>1</sup> *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Bush v. St. Louis, K. C. & N. R. Co.* 3 Mo. App. 62; *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Brod. & B. 177; *Heugh v. London & N. W. R. Co.* L. R. 5 Exch. 50; *Rooke v. Midland R. Co.* 14 Eng. L. & Eq. 175; *First Nat. Bank of Peoria v. Northern R. Co.* 58 N. H. 203.

<sup>2</sup> *Hudson v. Bazendale*, 2 Hurlst. & N. 575.

<sup>3</sup> *Weed v. Barney*, 45 N. Y. 344, 6 Am. Rep. 96.

<sup>4</sup> *Neal v. Wilmington & W. R. Co.* 8 Jones L. 482.

<sup>5</sup> *Lane v. Boston & A. R. Co.* 112 Mass. 455.

<sup>6</sup> *Stowce v. New York, B. & P. R. Co.* 113 Mass. 521.

<sup>7</sup> *Milligan v. Grand Trunk R. Co.* 17 U. C. C. P. 115.

<sup>8</sup> *Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 505, 4 Am. Rep. 709.

<sup>9</sup> *Galveston, H. & S. A. R. Co. v. Smith* (Tex. Civ. App.) Dec. 6, 1893.

that the destruction of the goods was the direct result thereof, the court refused to disturb the finding.<sup>1</sup> While a railroad company is not liable as a common carrier for goods destroyed by fire after they are unloaded and stored in its depot, although the consignee had repeatedly called for them and been told that they were not there, yet as the carrier's neglect and wrongful detention of the goods in its depot after the consignee has come after them and been told that they have not arrived is the proximate cause of their subsequent loss by fire, it makes the carrier liable for the loss as warehouseman, although the fire was not caused by its negligence.<sup>2</sup>

A carrier is liable for the loss of goods by fire while stored in a warehouse at the place of destination because not called for by the owner, where the carrier, after receiving the goods, had refused to ship them without prepayment of freight, and then promised to hold them during the detention of the owner, but afterwards shipped them without notice to the owner, who did not know of the shipment until after the fire.<sup>3</sup> A railroad company which upon the arrival of a carload of wheat notifies the consignees of its arrival, and thereupon places it in a reasonably safe place to await their action, is not liable for its accidental destruction by fire without negligence on its part.<sup>4</sup> When the consignee has notice of the arrival of his goods, and agrees with the carrier—for their mutual convenience—that the goods be left over night in the freight house, the liability as a common carrier has ceased, and the goods being destroyed by fire during the night, the carrier cannot be held as an insurer.<sup>5</sup>

In a suit to recover the value of goods shipped by railroad from Cincinnati to Kokomo, the goods were safely carried to Kokomo, and the consignee not being present to receive them, were there stored in the company's warehouse, which was reasonably secure. During the night, the goods were destroyed by some unknown

<sup>1</sup> *Jeffersonville R. Co. v. Cotton*, 29 Ind. 498, 95 Am. Dec. 656.

<sup>2</sup> *East Tennessee, V. & G. R. Co. v. Kelly*, 17 L. R. A. 691, 91 Tenn. 699.

<sup>3</sup> *Campion v. Canadian Pac. R. Co.* 11 L. R. A. 128, 43 Fed. Rep. 775.

<sup>4</sup> *Pindell v. St. Louis & H. R. Co.* 41 Mo. App. 84.

<sup>5</sup> *Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 505, 4 Am. Rep. 709.

person, who entered the warehouse through a grain shoot. It was held, in this case, that the liability of the railroad company as a common carrier was terminated when the goods were discharged from the cars and stored in the warehouse; and, that as ordinary care was exercised in the keeping of the goods, the company was not liable for the loss.<sup>1</sup> The absence or failure of the consignee to remove the goods, will not absolve the carrier from responsibility. He must make reasonable efforts to place them in proper hands, and if this cannot be done, he must take care of the goods by holding them himself, or, in the absence of special circumstances or rules, he may lodge them with suitable persons for the owner, and when held or thus lodged, the duties of the carrier there cease;—but, if, according to the uniform course of business goods not demanded within the specified time, are disposed of and kept in a particular manner, or in a designated building, the carrier cannot terminate his liability by lodging them with some third person not authorized to receive them. If he deliver the goods to a person as the agent of the owner, he must show the fact of such agency, or circumstances which, in the opinion of the jury, would justify such delivery.

Where one of the rules of the carrier requires that goods should be taken away within twenty-four hours after their arrival, from the cars at their destination, and if not thus removed, they should be placed in store and storage charge thereon,—it was held that, if placed in store after twenty-four hours, the liability of the carrier would be changed to that of a warehouseman; but, that the delivery of the goods within twenty-four hours, to a person who had no authority to receive them, did not change the liability of the carrier, notwithstanding that the owner did not make demand for them until after the expiration of the time mentioned.<sup>2</sup> As a general rule, common carriers by land are bound to deliver the goods to the consignee at his residence or his place of business where, from the nature of the parcels, this is the more appropriate place for their delivery; nor is it sufficient that they are left at the

<sup>1</sup> *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140.

<sup>2</sup> *Angle v. Missouri & M. R. Co.* 18 Iowa, 551.

public office of the carrier, unless by express permission, or a usage so established and well known as to be equivalent to such permission. In *Union Exp. Co. v. Ohleman*, 92 Pa. 323, it was held that express companies, as common carriers, are bound to deliver personally to the consignee. But if the consignee is absent and the carrier, after diligent inquiry, cannot find him or ascertain the place of his residence or business, then the liability as a carrier is deemed at an end. But it is the duty of the carrier to take care of the goods, by holding them himself or depositing them with some suitable person for the consignee, and, in such case, the person holding the goods becomes the bailee of the owner or consignee, and is only bound to reasonable diligence.<sup>1</sup>

Where the delivery cannot be made at the end of the carrier's route to the consignee, by reason of his absence without any designated agent, the carrier may terminate its liability by depositing the goods in a warehouse.<sup>2</sup> It is the duty of the consignee to inform the carrier before the arrival of the goods, so that the latter may know where to give notice to the consignee. If such information is not given, the carrier may be exonerated by storing the goods after having first made due inquiries to ascertain the residence of the consignee.<sup>3</sup> Where goods have been carried to their place of destination, and there deposited in the carrier's warehouse, awaiting the owner's convenience in taking them away, carriers are only subject, in respect to such goods, to the responsibility of warehouseman. The consignee must take notice of the usage of the railway company, to store the goods on their arrival at the depot.<sup>4</sup>

In Massachusetts it is said that, although the consignee has had no opportunity to remove the goods before they have been destroyed by fire, yet the carrier is not liable, if he has stored them, using proper care.<sup>5</sup> Another class of cases, however, hold

<sup>1</sup> *American Exp. Co. v. Hockett*, 30 Ind. 250, 95 Am. Dec. 691, *ante*, § 1, a.

<sup>2</sup> *Northrop v. Syracuse & B. R. Co.* 5 Abb. P. R. N. S. 425.

<sup>3</sup> *Pelton v. Rensselaer & S. R. Co.* 54 N. Y. 214, 13 Am. Rep. 568.

<sup>4</sup> *McCarty v. New York & E. R. Co.* 30 Pa. 247.

<sup>5</sup> *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 263, 61 Am. Dec. 423; *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433; *Stoice v. New York, B. & P. R. Co.* 113 Mass. 521; *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126. To



that the storage by a railway company as carrier is for its own convenience, and that its liability continues until the consignee, exercising due diligence, has had a reasonable time to remove them. Until such opportunity is afforded, the carrier remains under his common law liability as carrier and not as warehouseman.<sup>1</sup>

An attempt has been made to state two rules as to the termination of liability as carrier. The Massachusetts rule is that when the transit is ended, and the carrier has placed the goods in his warehouse to await delivery to the consignee, his liability as carrier is ended also, and he is responsible as warehouseman only after a reasonable time has elapsed for their removal.<sup>2</sup> But in New Jersey the rule has been stated, as it has in Indiana, without the qualification. After the goods are safely stored and protected from the weather and thieves and are ready for delivery, it is said that the railroad company becomes a warehouseman, liable only for ordinary care.<sup>3</sup> Inasmuch as the consignee is usually advised of the time of the arrival of his goods at the station, and is usually represented at the depot by a truckman, instructed to receive the shipment, the general rule is that the warehouse or depot at the town or station to which the goods are shipped by the railroad, is the proper place of delivery to the consignee. Where they are discharged from the cars, and in the absence of the consignee, are safely stored in the company's warehouse, the liability of the railroad company as a common carrier has terminated, without notice to the consignee of the arrival of the goods.<sup>4</sup>

the same effect are, *National Line S.S. Co. v. Smart*, 107 Pa. 492; *Pindell v. St. Louis & H. R. Co.* 34 Mo. App. 675; *Gashceiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 112, 53 Am. Rep. 558; *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140; *Southwestern R. Co. v. Felder*, 46 Ga. 433; *Rothschild v. Michigan Cent. R. Co.* 69 Ill. 164; *Merchants Dispatch & T. Co. v. Hallock*, 64 Ill. 284; *Mohr v. Chicago & N. W. R. Co.* 40 Iowa, 579; *Spears v. Spartanburg, U. & C. R. Co.* 11 S. C. 158; *Jackson v. Sacramento Valley R. Co.* 23 Cal. 268; *Louisville & N. R. Co. v. Oden*, 80 Ala. 39.

<sup>1</sup> *Moses v. Boston & M. R. Co.* 32 N. H. 523, 64 Am. Dec. 381; *Winslow v. Vermont R. Co.* 42 Vt. 700, 1 Am. Rep. 365; *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Lenke v. Chicago, M. & St. P. R. Co.* 39 Wis. 449; *Hirsch v. The Quaker City*, 2 Disney, 144; *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 468; *Maignan v. New Orleans, J. & G. N. R. Co.* 24 La. Ann. 333.

<sup>2</sup> *Thomas v. Boston & P. R. Co.* 10 Met. 472, 43 Am. Dec. 444.

<sup>3</sup> *Morris & E. R. Co. v. Ayres*, 29 N. J. L. 393, 80 Am. Dec. 215.

<sup>4</sup> *Bansemmer v. Toledo & W. R. Co.* 25 Ind. 434, 87 Am. Dec. 367.

What, with equal propriety, has been called the New Hampshire rule, is that merely placing the goods in the warehouse does not discharge the carrier, but he remains liable as such until the consignee has had a reasonable time after their arrival to inspect and take them away in the common course of business. The doctrine of the Massachusetts cases was first propounded in *Thomas v. Boston & P. R. Corp.* 10 Met. 472, 43 Am. Dec. 444, and was approved in *Norway Plains Co. v. Boston & M. R. Co.* 1 Gray, 263, 61 Am. Dec. 423. In the latter case Chief Justice Shaw, delivering the opinion, said: "Although there is no separate charge for storage, yet the freight to be paid, fixed by the company, as a compensation for the whole service, is paid as well for the temporary storage, as for the carriage. This renders both the services, as well the absolute undertaking for the carriage, as the contingent undertaking for the storage, to be services undertaken to be done for hire and reward. From this view of the duty and implied contract of the carriers by railroad, we think there result two distinct liabilities: first, that of common carriers, and afterwards that of keepers for hire, or warehouse keepers. . . . We may then say, in the case of goods transported by railroad, either that it is not the duty of the company as common carriers to deliver the goods to the consignee, which is more strictly conformable to the truth of the facts; or, in analogy to the old rule, that delivery is necessary, it may be said that the delivery by themselves as common carriers to themselves as keepers for hire, conformably to the agreement of both parties, is a delivery which discharges their responsibility as common carriers. If they are chargeable after the goods have been landed and stored, the liability is one of a very different character, one which binds them only to stand to losses occasioned by their fault or negligence."

In *Sessions v. Western R. Corp.* 16 Gray, 132, a part of the goods had been removed by the consignee. The balance was afterwards lost from the company's warehouse. The court approved the rule laid down by Chief Justice Shaw, and said that a storage by the company in its warehouse was a constructive delivery. Freight to be ultimately paid is a sufficient consideration for a promise to keep safely, and the carrier becomes a bailee for

hire.<sup>1</sup> A railroad company was held liable for discharging a cargo of assorted coal on the ground at the place of consignment, so that it could not be carried away without mixing the different kinds of coal and gathering up soil. The contract of a common carrier includes not only the transportation of merchandise to a particular point, but also its delivery there to the consignee, or the putting it into a suitable place where it can be received by him. A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road; it is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury.<sup>2</sup> A railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman, as matter of fact, and according to the usages and necessities of the business in which it is engaged.<sup>3</sup> And it is liable for the custody of the goods as a warehouseman.<sup>4</sup> Under a contract for carriage a common carrier is an insurer until the transit is ended, and then liable only as warehouseman during such reasonable time as the goods are in its custody awaiting the call of the consignee.<sup>5</sup> The rule laid down by the courts of New Jersey, Indiana and Massachusetts prevails also in Georgia, Illinois, Iowa, Missouri, North Carolina and Pennsylvania. In *Southwestern R. Co. v. Felder*, 46 Ga. 433, it was held under Ga. Code, § 2044, the railway was relieved of liability as a common carrier after transportation of the freight within the accustomed time, a deposit of it in a place of safety, and the holding of it there ready for delivery on demand, unless a different custom as to delivery be shown. It was said that no notice to the consignee was necessary unless the goods arrive out of time, when a reasonable time also for removal must be allowed. And it was said that the re-

<sup>1</sup> *Barron v. Eldredge*, 100 Mass. 455, 1 Am. Rep. 126.

<sup>2</sup> *Rice v. Boston & W. R. Corp.* 98 Mass. 212.

<sup>3</sup> *Rice v. Hart*, 118 Mass. 201, 19 Am. Rep. 433.

<sup>4</sup> *Miller v. Mansfield*, 112 Mass. 260, cited in *Barker v. Brown*, 138 Mass. 340.

<sup>5</sup> *Bassett v. Connecticut River R. Co.* 145 Mass. 129; *Blaisdell v. Connecticut River R. Co.* 145 Mass. 132.

marks of Judge Lumpkin, in *Rome R. Co. v. Sullivan*, 14 Ga. 277, as to the necessity of notice, were merely incidental, the question of notice not being in the case. The rule laid down in *Southwestern R. Co. v. Felder*, *supra*, was approved in *Western & A. R. Co. v. Camp*, 53 Ga. 596. In this case the agent of the consignee of goods which had remained an unreasonable time in the company's depot was told by the agent of the company on Saturday that the goods could remain in the depot till Monday without further cost. It was held that the liability of the company as warehousemen was not changed.

Where a railroad company, instead of delivering baggage to the owner, delivered it to its own agent for deposit in its warehouse, its liability is that of a warehouseman; and it is bound to use ordinary diligence in taking care of it.<sup>1</sup> In Illinois it is held that neither delivery to the consignee personally nor notice is necessary to exonerate a railroad of its liability as carrier.<sup>2</sup> But the liability as carrier does not cease until the goods are unloaded from the car.<sup>3</sup> A common carrier may discharge itself from further liability as such, upon the failure of the consignee to receive grain transported by it, by selecting, in the exercise of ordinary and reasonable care, a responsible and safe depository, and storing the grain therein at the expense and risk of the owner, although, owing to an unprecedented and extraordinary flood, the grain is subsequently injured. A common carrier is not liable as a warehouseman for an injury to grain transported by it, after it has delivered it to an agent of the consignor, although it arranges with such agent for the preservation of its lien for charges for transportation.<sup>4</sup>

Before the introduction of railroads, nothing save the act of

<sup>1</sup> *Georgia R. & Bkg. Co. v. Thompson*, 86 Ga. 327.

<sup>2</sup> *Davis v. Michigan S. & N. I. R. Co.* 20 Ill. 412; *Richards v. Michigan S. & N. I. R. Co.* 20 Ill. 404; *Porter v. Chicago & R. I. R. Co.* 20 Ill. 407, 71 Am. Dec. 286; *Chicago & A. R. Co. v. Scott*, 42 Ill. 132; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Merchants Dispatch & T. Co. v. Hullock*, 64 Ill. 284; *Rothschild v. Michigan Cent. R. Co.* 69 Ill. 164; *Chicago & N. W. R. Co. v. Sawyer*, 69 Ill. 285, 18 Am. Rep. 613; *Merchants Dispatch & T. Co. v. Moore*, 88 Ill. 138, 30 Am. Rep. 541; *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 599.

<sup>3</sup> *Chicago & N. W. R. Co. v. Bensley*, 69 Ill. 630.

<sup>4</sup> *Gregg v. Illinois Cent. R. Co.* 147 Ill. 550, affirming 47 Ill. App. 530.

God or the public enemy could discharge a carrier by land from his liability before delivery to the consignee in person.<sup>1</sup> When the goods have arrived at the depot it is the carrier's duty to unload them and place them in a convenient place for delivery, and, if the consignee is then ready to receive them, to deliver them to him, but if he is not, the carrier must safely store them under the charge of competent servants, ready to be delivered when called for by those entitled to receive them. When this is done the carrier's duty is discharged. Whether the goods are unloaded directly into a warehouse or placed on a platform can make no difference to the rights of the parties.<sup>2</sup> In *Cincinnati & C. A. L. R. Co. v. McCool*, 26 Ind. 140, goods had arrived at the place of destination and been stored in a warehouse which was reasonably secure and safe. No notice was given to the consignee. During the night the warehouse was entered and the goods were destroyed. The company was not liable, they being warehousemen. The Iowa courts hold that failure to give notice does not continue the carrier's liability as such.<sup>3</sup>

In *Independence Mills Co. v. Burlington, C. R. & N. R. Co.* 72 Iowa, 535, Rothrock, J., said: "The principle upon which these cases [*Mohr v. Chicago & N. W. R. Co.* and *Francis v. Dubuque & S. C. R. Co. supra*] were determined is that, when a common carrier has transported the property to its destination, and done all of the acts pertaining to the carriage of the goods, his liability as such carrier ceases. There can, however, be no uniform rule as to what acts are necessary to be done to fulfill the carrier's contract. His duties must vary according to the nature of the consignment. In the cited cases the property was such that it could be removed from the cars and placed in an ordinary depot warehouse. But in the case at bar the grain was in bulk. It was not expected by the parties that it would be removed from the car by the railroad company and carried into its ware-

<sup>1</sup> *Merchants Dispatch & T. Co. v. Hallock*, 64 Ill. 286; *Bansemmer v. Toledo & W. R. Co.* 25 Ind. 437, 87 Am. Dec. 367.

<sup>2</sup> *Cahn v. Michigan Cent. R. Co.* 71 Ill. 96.

<sup>3</sup> *Mohr v. Chicago & N. W. R. Co.* 40 Iowa, 579; *Francis v. Dubuque & S. C. R. Co.* 25 Iowa, 60, 95 Am. Dec. 769.

house. It was its duty to place it in such a position on its track that it could be safely, and with a reasonable degree of convenience, unloaded by the plaintiff; and it was the right of the plaintiff to refuse to unload the car until it was so placed; and as long as the defendant, in obedience to its obligation as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease." On the arrival of goods at their destination and their discharge from the cars, the liability of the company ceases as carrier and it becomes a bailee for hire.<sup>1</sup> A railroad company which, upon the arrival of a carload of wheat, notifies the consignees of its arrival, and thereupon places it in a safe place to await their action, is not liable for its accidental destruction by fire without negligence on its part.<sup>2</sup> The rule in North Carolina is the same as that laid down by the Indiana court.<sup>3</sup> Woodward, J., in *McCurty v. New York & E. R. Co.* 30 Pa. 247, quoting Angell on Carriers, § 392, and Story on Bailments, § 448, lays down the rule as declared by Chief Justice Shaw.<sup>4</sup> In *Butler v. East Tennessee & W. R. Co.* 8 Lea, 32, it was held that the liability of the company ceased when the goods were deposited in the warehouse, and that the liability was not extended by the Act of 1870, chap. 17,<sup>5</sup> requiring carriers to give notice of the arrival of goods. In *Shepherd v. Bristol & E. R. Co.* L. R. 3 Exch. 189, the rule as declared by the Massachusetts court was adopted.

But, on the other hand, in *Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381, Sawyer, J., commenting on the rule laid down in *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263, 61 Am. Dec. 423, said that it was of a "plain, precise and practical character;" but that "by it the salutary and approved

<sup>1</sup> *Buddy v. Wabash St. L. & P. R. Co.* 20 Mo. App. 206; *Holtzelaw v. Duff*, 27 Mo. 395; *Cramer v. American Merchants U. Exp. Co.* 56 Mo. 524; *Gashweiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 112, 53 Am. Rep. 558.

<sup>2</sup> *Pindell v. St. Louis & H. R. Co.* 41 Mo. App. 84.

<sup>3</sup> *Neal v. Wilmington & W. R. Co.* 53 N. C. 482; *Turrentine v. Wilmington & W. R. Co.* 100 N. C. 375.

<sup>4</sup> See also *Shenk v. Philadelphia Steam Propeller Co.* 60 Pa. 109, 100 Am. Dec. 541.

<sup>5</sup> Rev. Stat. § 1993.

principles of the common law are sacrificed to considerations of convenience and expediency." This decision in New Hampshire is in accord with the rulings by the courts of Alabama, California, Connecticut, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New York, Ohio, Texas, Vermont and Wisconsin. The rule is unsettled in South Carolina.<sup>1</sup> It is the settled rule in Alabama that the railroad company continues responsible as a common carrier after the goods have been transported to their place of destination and stored in the depot, until the consignee or owner has had a reasonable opportunity to remove them; but that when a reasonable time has elapsed they become by operation of law warehousemen. The law by its operation passes the goods from them as carrier to them as warehousemen.<sup>2</sup> In *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209, the question of the precise point of time when the company ceases to be carrier and begins to be warehouseman was not discussed. In *Mobile & G. R. Co. v. Prewitt*, 46 Ala. 63, 7 Am. Rep. 586, goods had been consigned to the owner, "Care M. & G. R. R.," and a place was appointed for their delivery. Peters, J., in delivering the opinion, said: "When the railroad company thus undertakes to receive and keep the goods for the owner, it is an assumption of control that cannot be treated as a mere bailment without hire. For it cannot in justice be said that such a bailment is without hire, though no charges for storage are demanded. The accommodation itself is one that has a strong tendency to bring business to the company, because goods transported by them thus find a safe deposit until they can be removed by the owner. Thus, too, the company is paid for the use of its depots by the increase of its business. And when they assume thus to act as warehousemen for their customers, they must be treated as warehousemen for hire. And as the warehouse system, in connection with the great business of transportation, is a powerful inducement to increase the amount and value of the transportation itself, they must be regarded as warehousemen, demanding and receiving a

<sup>1</sup> *Spears v. Spartanburg, U. & C. R. Co.* 11 S. C. 158.

<sup>2</sup> *Western R. Co. v. Little*, 86 Ala. 159; *Alabama G. S. R. Co. v. Grabfelder*, 83 Ala. 200; *Kennedy v. Mobile & G. R. Co.* 74 Ala. 430.

very liberal reward. They are therefore bound to use ordinary diligence in keeping the goods deposited in their stationhouses or depots, and also to act without fraud or bad faith." Where goods were destroyed by fire the same night of their arrival, the company was held as a carrier, reasonable time for removal not having elapsed. As to other goods, notice having been given to the consignee, and reasonable time having elapsed after their arrival, the company was held liable as a warehouseman, its agent having failed to deliver the goods, on demand, to drayman of the consignee.<sup>1</sup>

In *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404, McClellan, J., said: "It has been supposed by some text-writers and annotators that this court, following that line of authority on the subject of which *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray, 263, 61 Am. Dec. 423, is the leading case, has adopted the rule, that the extraordinary liability of a railway company, as a common carrier of goods, ceases when the consignment arrives at its destination, is unloaded from the cars, and nothing further, so far as the transit is concerned, remains to be done by the carrier; and that thereafter the liability of the carrier is that only of a warehouseman for hire. This supposition is based on an interpretation of the opinion in the case of *Alabama & T. R. R. Co. v. Kidd*, 35 Ala. 209, which has never obtained in this court, or been entertained by the profession here. That case has always been construed by this court to sustain the rule which extends the liability, as such, for a reasonable time, after the transit has been completed, for delivery of goods to consignees.<sup>1</sup> And our later decisions fully support the rule, first announced by the supreme court of New Hampshire in the case of *Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381, . . . that the liability of a common carrier by rail, as an insurer of the consignment continues throughout the transit, and until the goods have been unloaded from the cars, and deposited in the depot or warehouse of the carrier, or otherwise made ready for delivery, and a reasonable time there-

<sup>1</sup> *Louisville & N. R. Co. v. McGuire*, 79 Ala. 397



after has elapsed to afford the consignee an opportunity to come and take them away, and that only after the lapse of a reasonable time, beginning when the transit is complete, and the shipment is ready for delivery, will the liability, in the absence of special stipulation, of the carrier as such, be converted into the less rigid and exacting liability of a warehouseman for reward." And a late decision declares that after a reasonable time for a consignee to take goods from a carrier is liable only as warehouseman.<sup>1</sup>

In *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 268, the Massachusetts rule was followed. But in a very late case it has been held that notice must be given a consignee upon arrival and storage of goods, in order to reduce the degree of care required of the carrier to that of warehousemen under California Civil Code, § 2120, providing that if for any reason a carrier does not deliver freight to the consignee or his agent personally he must give notice to the consignee of its arrival, and keep the same in safety on his responsibility as a warehouseman until the consignee has had a reasonable time to remove it.<sup>2</sup> In *Graves v. Hartford & N. Y. S. B. Co.*, 38 Conn. 143, 9 Am. Rep. 369, the agent of the consignee called for cotton at the wharf of the defendant and was told that it was not yet off the boat. The cotton was subsequently unloaded and placed on the wharf, where it was shortly after destroyed by fire which had started without fault of the defendants. The company was held liable as a carrier. Seymour, J., said: "Whatever reasons there are for imposing a strict rule of responsibility during the transit exist and continue in full force until the consignee has reasonable time to take the goods into his own care and custody. The rule adopted in Massachusetts has the merit of being definite and of easy application, and may, in many cases, avoid a painful controversy as to what, under the circumstances, is a reasonable time with which the consignee must appear and take his goods. But, on the other hand, that rule puts an end to the carrier's responsibility as such, just where

<sup>1</sup> *Columbus & W. R. Co. v. Ludden*, 89 Ala. 612, 42 Am. & Eng. R. Cas. 404.

<sup>2</sup> *Wilson v. California Cent. R. Co.* 94 Cal. 166. See also *Hirschfeld v. Central Pac. R. Co.* 56 Cal. 484.

that responsibility is of the highest value to the shipper. Between the deposit of the goods on the platform and their delivery to the consignee, they are exposed to theft, depredation, and injury by strangers, and by the carrier's employes. In making delivery care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier upon the full responsibility pertaining to him as such, and he ought not to be allowed to lay aside that responsibility until the owner of the goods has had a fair and reasonable time and opportunity to receive them."<sup>1</sup> Where goods shipped over a railroad are permitted by the owner to remain at the depot of their destination until the railroad company becomes liable therefor only as warehousemen, and afterwards, on demanding them, he is informed by the agent in charge of such depot that the goods have not yet arrived, the failure to deliver the goods on demand is such negligence as will render the company liable for their loss by the subsequent burning of the depot.<sup>2</sup>

The earliest case in Michigan in which this question was discussed was that of *McMillan v. Michigan, S. & N. I. R. Co.*, 16 Mich. 79, 93 Am. Dec. 208, in which the court was equally divided. In this case Cooley, J., said: "The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to proceed with their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is gen-

<sup>1</sup> As supporting this rule, see also: *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 473; *Maignan v. New Orleans, J. & G. N. R. Co.* 24 La. Ann. 337.

<sup>2</sup> *Union Pac. R. Co. v. Moyer*, 40 Kan. 184.

erally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected, in accordance with what is an almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who therefore never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods, until the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least,—where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was left outside. . . . The owner wants storage only until he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for incidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can claim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and to facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures. . . . A

<sup>1</sup> Compare *Scholes v. Ackerland*, 13 Ill. 650; *Crawford v. Clark*, 15 Ill. 561; *Richards v. Michigan, S. & N. I. R. Co.* 20 Ill. 404; *Porter v. Chicago & R. I. R. Co.* 20 Ill. 407, 71 Am. Dec. 286. See also *Chicago & R. I. R. Co. v. Warren*, 16 Ill. 502, 63 Am. Dec. 317.

critical examination of the cases on this subject would scarcely be useful. As they cannot be reconciled the court must follow its own reasons. I am unable to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except by that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, imposes upon him no unreasonable burden. If, by understanding with the consignee, the goods were to remain in store for a definite period, or until he should give directions concerning them, the rule would be different, because the relation of warehouseman would then be established by consent. In the absence of such understanding, sound policy, I think, requires the carrier to be held liable as such until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the consignee to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to promptness on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them."

Shortly after this, in *Buckley v. Great Western R. Co.* 18 Mich. 121, a majority of the court held that, in the absence of usage, or any circumstance, which would justify the conclusion that the agreement to carry included one for storage also, the liability of a carrier for goods stored in its warehouse remains that of a common carrier. In the absence of an express contract or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage upon the subject, a railway company cannot shift its responsibility as a common carrier to that of a warehouseman by depositing the goods in the warehouse at the end of the route.<sup>1</sup> But it was held that a carrier cannot be held liable for safe keeping of goods which it has delivered to a warehouseman, in accordance with its custom, long acquiesced in by the consignee.<sup>2</sup>

<sup>1</sup> *Fiege v. Michigan Cent. R. Co.* 62 Mich. 1.

<sup>2</sup> *Black v. Ashley*, 80 Mich. 90, 42 Am. & Eng. R. Cas. 428.

A carrier's liability terminates whenever the care and custody of the property has passed from the carrier to the owner or some bailee of his own choosing, or whenever the owner has, after its arrival at its destination, had a reasonable opportunity of taking the property into his own charge.<sup>1</sup> In *Burlington & M. R. Co. v. Arms*, 15 Neb. 69, it was said that the railway was liable until notice had been given of the arrival of the goods and a reasonable time for their removal had intervened. A railway company remains liable in the absence of special contract, or proven custom, as common carrier until the consignee has reasonable time, after notice of arrival, to remove the goods.<sup>2</sup> In *Fenner v. Buffalo & S. L. R. Co. supra*, Earl, C., thus summarized the result of the decisions in New York: "If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases." In *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574, the Massachusetts rule was expressly condemned. In this case goods were shipped from New York to Boston. Upon arrival of goods at the place of destination the consignee called for them but was refused delivery until the next day. During the same afternoon they were unloaded and placed in the defendant's warehouse and during the succeeding night were destroyed by fire. The plaintiff recovered. Under a bill of lading providing that the carrier shall be liable as a warehouseman, and not as a carrier after the goods had arrived at their destination, and been "placed on the platform or in the storeroom of the company or to be taken from the car by the consignee," without specifying

<sup>1</sup> *Arthur v. St. Paul & D. R. Co.* 33 Minn. 95.

<sup>2</sup> *Hedges v. Hudson River R. Co.* 49 N. Y. 223; *Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 505, 4 Am. Rep. 709; *Zinn v. New Jersey S. B. Co.* 49 N. Y. 442, 10 Am. Rep. 402; *McAndrew v. Whitlock*, 52 N. Y. 40; *McKinney v. Jewett*, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209.

what shall be done with them upon their arrival at the carrier's warehouse, such carrier has its option to retain them in the car to be taken from it by the consignee, or to place them in the storehouse, and in either case liability as a common carrier ceases, after a reasonable time given to the consignee to remove them.<sup>1</sup> A carrier's liability continues, in the absence of any statutory provision on the subject, after the goods have reached their destination, until the consignee has been notified of their arrival and has had reasonable time to call for and remove them.<sup>2</sup> Under Tex. Rev. Stat. arts. 281, 282, the liability of the carrier of freight, as such, continues until the thing carried is actually delivered to the owner or consignee, unless due diligence has been used to give notice to such persons of the arrival at destination.<sup>3</sup>

But where goods reached the depot of the carrier, and the owner, being present, is advised that they cannot be stored for want of room and he leaves them—if the carrier assumes the care of the goods by putting them in its warehouse, it may be liable as a depositary; but, if it refuse to store them and do nothing with them, or merely puts them off its premises without damage, it will not be chargeable. If, however, after such refusal, the carrier takes care of the goods, the jury may infer a waiver of the refusal and an assumption of the duty as depositary.<sup>4</sup> A common carrier which undertakes to transport property without requiring the prepayment of freight is bound to use the same care in transporting, storing, and holding it that it should use had the freight been prepaid.<sup>5</sup>

<sup>1</sup> *Draper v. Delaware & H. Canal Co.* 118 N. Y. 110.

<sup>2</sup> *Lake Erie & W. R. Co. v. Hatch*, 6 Ohio, C. C. 230.

<sup>3</sup> *Missouri Pac. R. Co. v. Haynes*, 72 Tex. 175; *Houston & T. C. R. Co. v. Adams*, 49 Tex. 748, 30 Am. Rep. 116. The cases of *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Winslow v. Vermont R. Co.* 42 Vt. 700, 1 Am. Rep. 365; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773; *Wood v. Milwaukee & St. P. R. Co.* 27 Wis. 541, 9 Am. Dec. 465; *Parker v. Milwaukee & St. P. R. Co.* 30 Wis. 689; *Lenke v. Chicago, M. & St. P. R. Co.* 39 Wis. 449,—also supports the doctrine declared in the majority of the states.

<sup>4</sup> *Smith v. Nashua & L. R. Co.* 27 N. H. 86, 59 Am. Dec. 364.

<sup>5</sup> *St. Louis, A. & T. H. R. Co. v. Flannagan*, 23 Ill. App. 489

What a reasonable time, under the rule continuing the carrier's liability as carrier, after his duty as such has been fully discharged, which must be allowed to the consignee, should be, must, in the nature of the case, when not provided for by express contract, depend upon those circumstances which would tend to notify the consignee of the probable time of arrival.<sup>1</sup> It is not a time varying with the distance, convenience, or necessities of the consignee, but it is such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods.<sup>2</sup> Notice of the arrival of goods given by the carrier to the consignee after dark, during one of the winter months, will not require him to call for them before business hours on the following day.<sup>3</sup> Upon failure of a consignee to remove goods shipped, three days after notice of their arrival and request to remove, the carrier is responsible only as a warehouseman.<sup>4</sup>

A reasonable time within which to remove from the depot household goods shipped from Indiana to California is not, as matter of law, limited to three months where the owner wrote to the freight agent a letter received two days after the arrival of the goods, notifying him that she was sick and asking him to store the goods in a fire-proof warehouse, and the only attempt at giving her notice of their arrival was a letter so defectively addressed that it never reached her, and possibly a postal card addressed to her at the point of destination.<sup>5</sup> An action cannot be sustained where the proof shows that, at the time of the loss or injury, the liability as carrier had terminated and the company held the goods merely as warehousemen.<sup>6</sup> A carrier is not liable to the consignor for property seized under legal process while held by him as a warehouseman, although he may have failed to forward it promptly on notice to do so. Notice to the owner of goods held by a carrier as a warehouseman, of the fact of their

<sup>1</sup> *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 473.

<sup>2</sup> *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Derosia v. Winona & St. P. R. Co.* 18 Minn. 133; *Kinney v. First Div. St. Paul & P. R. Co.* 19 Minn. 251; *Wood v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

<sup>3</sup> *Lake Erie & W. R. Co. v. Hatch*, 6 Ohio, C. C. 230.

<sup>4</sup> *Anniston & A. R. Co. v. Ledbetter*, 92 Ala. 326.

<sup>5</sup> *Wilson v. California Cent. R. Co.* 17 L. R. A. 685, 94 Cal. 166.

<sup>6</sup> *Alabama G. S. R. Co. v. Grabfelder*, 83 Ala. 200.

seizure on legal process, which gives him timely knowledge of the situation of the goods, is sufficient to relieve the carrier.<sup>1</sup> A condition of a contract of shipment of horses, that no claim for loss or damage to the stock shall be valid unless made in writing within thirty days after the same occurs, applies to the carrier's conduct as a warehouseman, since such relation is properly incident to that of carrier.<sup>2</sup> Failure of a carrier to deliver goods on demand, after storage, without lawful excuse, is a breach of the carrier's original contract for which suit may be brought on that contract.<sup>3</sup>

A warehouseman who pays a bank which discounts a draft secured by a warehouse receipt of a cargo of peas, which has been accepted by the consignee, upon the claim that the consignee after accepting the draft had without authority taken possession of the peas, and obtains a transfer from the bank, together with the warehouse receipt, may bring an action on the draft against the consignee, and the defense that plaintiff has wrongfully delivered up the cargo of peas to defendant in violation of N. Y. Penal Code, § 633, is unavailable.<sup>4</sup> A warehouseman who has given a receipt for eggs in cases without any distinguishing marks, but which he can identify, and which are stated in the receipt to be subject to the order of a third person, who has made advances on them, as the warehouseman knows from the course of business, is liable to the third person in case he delivers them to the depositor without an order from such person, although he retains other eggs belonging to the depositor to answer the receipt.<sup>5</sup> The burden is on the carrier in an action for failure to deliver goods, to prove its alleged freedom from fault or negligence, where it admits the contract, and then alleges that the goods were safely carried and stored in its warehouse at their destination under circumstances that reduced its obligation to that of warehouseman, and while so stored were destroyed by fire without fault or negligence on its part.<sup>6</sup>

<sup>1</sup> *McVagh v. Atchison, T. & S. F. R. Co.* 3 N. M. 205.

<sup>2</sup> *Armstrong v. Chicago, M. & St. P. R. Co.* 53 Minn. 183.

<sup>3</sup> *Wilson v. California Cent. R. Co.* 17 L. R. A. 685, 94 Cal. 166.

<sup>4</sup> *Burnham v. Cape Vincent Seed Co.* 142 N. Y. 169.

<sup>5</sup> *Fifth Nat. Bank v. Providence Warehouse Co.* 9 L. R. A. 260, 17 R. I. 112.

<sup>6</sup> *Wilson v. California Cent. R. Co.* 17 L. R. A. 685, 94 Cal. 166.



## CHAPTER XXIII.

### ACTION AGAINST CARRIER OF GOODS—INSURANCE—PRESUMPTION—STATUTORY LIMITATION OF LIABILITY.

- § 147. *Title in Goods Shipped—Who may Sue for Loss.*
- § 148. *Insurance on Goods by Carrier.*
- § 149. *Liability of Carrier of Goods.*
- § 150. *Presumption from Loss of Goods—Burden of Proof.*
- § 151. *Damages for Loss, Injury or Delay of Goods.*
- § 152. *Limitation of Right of Action.*
- § 153. *Claim of Limit of Liability under Revised Statutes of the United States.*
- § 154. *When the United States Courts Have Jurisdiction.*
- § 155. *Proceedings against Violators of the Interstate Commerce Act.*
  
- § 147. *Title in Goods Shipped—Who may Sue for Loss.*

A common carrier has a special title in property shipped which gives it a legal right to its custody before delivery to the consignee as against one having no right.<sup>1</sup> The owner of a vessel is the bailee of the cargo and may maintain an action for its destruction.<sup>2</sup> To produce a change of property from the shipper to the consignee it is essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other agreed to buy.<sup>3</sup> Where goods are sent by vendor to vendee, the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for them.<sup>4</sup> But if, by the terms of dealing between

<sup>1</sup> *State v. Intoxicating Liquors*, 3 Inters. Com. Rep. 581, 83 Me. 158.

<sup>2</sup> *Newell v. Norton*, 70 U. S. 3 Wall. 257, 18 L. ed. 271; *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 43, 17 L. ed. 609.

<sup>3</sup> *The Frances*, 12 U. S. 8 Cranch, 359, 3 L. ed. 589, 13 U. S. 9 Cranch, 183, 3 L. ed. 698; *The Francis*, 2 Gall. 391; *Wilmshurst v. Bowker*, 5 Bing. N. C. 541, 7 Scott, 561, 2 Man. & G. 792.

<sup>4</sup> *Fragano v. Long*, 4 Barn. & C. 219; *Stanton v. Eager*, 16 Pick. 467; *Daves v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 Bos. & P. 584; *Brown v. Hodgson*, 2 Campb. 36; *Abbott*, Shipping, 326.

the consignor and consignee, the latter is not to acquire the property in the goods, or if the consignee procured the goods to be consigned to him by fraud, so that no property in them passed to him, the consignor may sue.<sup>1</sup> So, if the goods were sent merely for approval or the carrier has contracted to be liable to the consignor.<sup>2</sup>

If the consignor purchases the goods merely as agent of the consignee by delivery of the same to the carrier, the property of the consignor is divested and he cannot bring an action against the carrier. And the fact that the bill of lading states the goods to be on account and risk of the consignee is prima facie evidence of the consignee's ownership.<sup>3</sup> But, notwithstanding the freight is payable by the consignee, if the goods are at the risk of the consignor during their transportation, the property remains in the consignor till delivery.<sup>4</sup> The mere shipment of the goods does not always vest the property of them in the consignee though he be the purchaser, yet where the bills of lading were made for delivery to the shipper's own order, or to ———— or order or assigns, or give notice to the carrier that they are shipped on some condition, in such case the carrier can only safely deliver to the holder of the bill of lading indorsed by the shipper, to whose order they are thereby to be delivered.<sup>5</sup>

A carrier which delivers to a shipper goods of which the bill of lading has been transferred to a bona fide holder by the consignee,

<sup>1</sup> *Freeman v. Birch*, 1 Nev. & M. 420; *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Brod. & B. 177.

<sup>2</sup> *Swain v. Shepherd*, Mood. & R. 224; *Moore v. Wilson*, 1 T. R. 659.

<sup>3</sup> *The Mary & Susan*, 14 U. S. 1 Wheat. 25, 4 L. ed. 27; *Potter v. Lansing*, 1 Johns. 215, 3 Am. Dec. 210.

<sup>4</sup> *McIntyre v. Bourne*, 1 Johns. 229; *Ludlow v. Bourne*, 1 Johns. 1, 3 Am. Dec. 277; *De Wolf v. New York Firemen Ins. Co.* 20 Johns. 214; *The Venus*, 12 U. S. 8 Cranch. 253, 3 L. ed. 553; *The Merrimack*, 12 U. S. 8 Cranch. 317, 327, 328, 3 L. ed. 575, 578, 579; *The Frances*, 13 U. S. 9 Cranch. 183, 3 L. ed. 698; *The Mary & Susan*, 14 U. S. 1 Wheat. 25, 4 L. ed. 27; *The St. Joze Indiano*, 14 U. S. 1 Wheat. 208, 212, 4 L. ed. 773, 74; *Isley v. Stubbs*, 9 Mass. 65, 6 Am. Dec. 29; *Chandler v. Sprague*, 5 Met. 306, 38 Am. Dec. 404. See *Griffith v. Ingledew*, 5 Serg. & R. 429, 9 Am. Dec. 444.

<sup>5</sup> *Brandt v. Boulby*, 2 Barn. & Ad. 932; *Mitchel v. Ede*, 3 Perry & D. 513, 11 Ad. & El. 888; *Abbott, Shipping*, 327-330. See *Ogle v. Atkinson*, 1 Marsh. 323, 5 Taunt. 759; *Coxe v. Harden*, 4 East, 211; *Nichols v. Clent*, 3 Price, 547.

to whom it was delivered by the shipper, is liable to the holder for a conversion of the goods.<sup>1</sup> Where bills of lading to shipper's order are to ————— or order indorsed, or by which the goods are made deliverable to the consignee by name or transmitted to the consignee as security for advances or to indemnify him from liability on account of a particular consignment which they represent, they are evidence of such appropriation to him of the goods as will vest in him the property absolute, or specially in them, and render the carrier responsible for their loss or injury.<sup>2</sup> If delivery is ordered to a mere agent of the shipper, he has no property in the goods and cannot bring an action in his own name for non-delivery.<sup>3</sup> So if goods are consigned to A, for the use of B, B ought to bring the action.<sup>4</sup> Persons paying for goods on the faith of bills of lading issued by a carrier to their agents occupy towards such carrier the position of bona fide purchasers.<sup>5</sup> Where there is an agreement between the consignor and consignee that the consignee shall make advances on the credit of the goods consigned and disposed of them on commission, for his reimbursement, or where he has made advances on them, the consignee acquires a vested interest in the goods, which will entitle him to bring an action against the carrier for loss, waste, or wrongful conversion thereof.<sup>6</sup>

Where a party in control of merchandise contracts with a common carrier for its transportation, and is both consignor and consignee, it must, in the absence of proof to the contrary, be assumed that he had sufficient title and right to maintain an action for

<sup>1</sup> *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

<sup>2</sup> *Walley v. Montgomery*, 3 East, 585; *Huille v. Smith*, 1 Bos. & P. 563; *Ander-son v. Clark*, 2 Bing. 20; *Bryans v. Nix*, 4 Mees. & W. 902; *Patten v. Thompson*, 5 Maule & S. 356; *Vertue v. Jewell*, 4 Campb. 31; *Evans v. Nichol*, 4 Scott, N. R. 43; *Bruce v. Waut*, 3 Mees. & W. 15; *Abbott, Shipping*, 333; *Dows v. Cobb*, 12 Barb. 310, 10 N. Y. Leg. Obs. 161.

<sup>3</sup> *Waring v. Cox*, 1 Campb. 369; *Coze v. Harden*, 4 East, 211. But see *Morrison v. Gray*, 2 Bing. 260; *Story, Agency*, 349, 356.

<sup>4</sup> *Evans v. Marlett*, 1 Ld. Raym. 271; *Sargent v. Morris*, 3 Barn. & Ald. 273.

<sup>5</sup> *The H. G. Johnson*, 48 Fed. Rep. 696.

<sup>6</sup> *Grosvenor v. Phillips*, 2 Hill, 147; *Adams v. Bissell*, 28 Barb. 382; *Dows v. Greene*, 32 Barb. 490; *Wilson v. Nason*, 4 Bosw. 155; *Alvord v. Latham*, 31 Barb. 294; *Milliken v. Dehon*, 27 N. Y. 364; *Rawls v. Deshler*, 3 Keyes, 572; *Williams v. Tilt*, 36 N. Y. 319; *Bates v. Cunningham*, 12 Hun, 21; *Brown v. Combs*, 63 N. Y. 598.

damages for negligence of the carriers in the transportation of such merchandise, and to enforce the contract.<sup>1</sup> Where a right of action, although connected with the existence of a statute, whether sounding in tort or in contract, is not granted by the statute, but results from the applications of common law principles, it is not lost by the repeal of the statute.<sup>2</sup> An action against the common carrier upon a custom is founded upon a tort, and arises *ex delicto*, and it is unnecessary to join as defendants, all the owners of the vehicle employed in the conveyance.<sup>3</sup> Where there is a special contract varying the liability of a carrier, an action against it is properly brought thereon, instead of on its general liability.<sup>4</sup> Where the contract creates different obligations from those arising from a mere delivery of goods to a common carrier, in that it bars a recovery for certain acts of negligence, whether by the defendant, or by other connecting roads, and fixes a value on the stock and the plaintiff has designedly omitted to plead this contract, because he thought he would stand better on his rights at common law, the variance is a material and fatal one.<sup>5</sup> If there be an express contract contained in the bill, a suit founded thereon should generally be brought by the shipper or by the owner where the shipper acted as his agent.<sup>6</sup>

Yet no general rule can be laid down, as the rights of the consignee will depend on the circumstances of each case, and the carrier will be liable to the consignor or consignee according to the right of the property as between them.<sup>7</sup> The consignee is presumed to be the owner, and if the goods are lost or diverted

<sup>1</sup> *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

<sup>2</sup> *Graham v. Chicago, M. & St. P. R. Co.* 53 Wis. 473.

<sup>3</sup> *Orange County Bank v. Brown*, 3 Wend. 153.

<sup>4</sup> *Boaz v. Central R. Co.* 87 Ga. 463.

<sup>5</sup> *Camp v. Hartford & N. Y. S. B. Co.* 43 Conn. 335, 340, 341; *Russell v. South Britain Soc.* 9 Conn. 522; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457, 469; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422; *Boylan v. Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290; *Austin v. Manchester, S. & L. R. Co.* 16 Q. B. 600.

<sup>6</sup> *Sargent v. Morris*, 3 Barn. & Ald. 277; *Berkley v. Watling*, 7 Ad. & El. 29; *Thompson v. Dominy*, 14 Mees. & W. 403; *Anderson v. Clark*, 2 Bing. 20; *Abbott, Shipping*, 337.

<sup>7</sup> *Dows v. Cobb*, 12 Barb. 310, 10 N. Y. Leg. Obs. 161; *Dows v. Greene*, 16 Barb. 72; *Patterson v. Perry*, 5 Bosw. 518, 10 Abb. Pa. 82.

*in transitu*, suit may be brought, either in his name or that of the owner.<sup>1</sup> But this presumption may be rebutted.<sup>2</sup> A consignee who is not the managing owner, may sustain libel against the ship for non-delivery of the goods.<sup>3</sup> The consignee may file a libel in a court of admiralty of the United States for injuries to the cargo caused by a collision.<sup>4</sup> The owners of vessels and ships cargo and all other persons affected by the injury may be made parties to a suit for collision or it may be prosecuted by the master, as the agent of all concerned. Where the owners of a ship or vessel damaged by a collision are carriers of the cargo, they may recover for its loss or injury in a suit for the collision, and where the suit is commenced by the owners of the injured vessel, the owners of the cargo may petition to intervene for the protection of their interests at any time, before the fund is actually distributed.<sup>5</sup> The original owners of property entrusted to expressmen may maintain an action for its loss against the common carrier employed by the expressman to transfer it. An action by the owners of goods may be maintained directly upon a separate contract for their conveyance made by the first with the second carrier in whose hands they are lost.<sup>6</sup>

The party to a contract of carriage could maintain an action for its breach at common law, whether he was the owner or not.<sup>7</sup> This rule has not been altered in states proceeding under a code.<sup>8</sup> This rule is not changed by the fact that the plaintiffs may be ac-

<sup>1</sup> *Fitzhugh v. Winan*, 9 N. Y. 559; *Sheets v. Wilgus*, 56 Barb. 662.

<sup>2</sup> *Sweet v. Barney*, 23 N. Y. 335.

<sup>3</sup> *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58.

<sup>4</sup> *The Telegraph v. Gordon* ("The Vaughan & Telegraph") 81 U. S. 14 Wall. 258, 20 L. ed. 807.

<sup>5</sup> *La Tourette v. Burton* ("The Commander-in-Chief") 68 U. S. 1 Wall. 43, 17 L. ed. 609.

<sup>6</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465.

<sup>7</sup> *Sargent v. Morris*, 3 Barn. & Ald. 283; *Dunlop v. Lambert*, 6 Clark & F. 600; *Blanchard v. Page*, 8 Gray, 281; *Finn v. Western R. Corp.* 112 Mass. 524, 17 Am. Rep. 122; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *Hutchinson, Carriers*, § 733.

<sup>8</sup> *Considerant v. Brisbane*, 22 N. Y. 389; *Sargent v. Morris*, 3 Barn. & Ald. 283; *Bliss, Code Pl.* § 59.

countable to others for a part of the recovery.<sup>1</sup> It is undoubtedly the general rule that an action against a common carrier for the breach of his contract, or of his duty to carry, must be brought in the name of the owner of the goods, although the contract may have been made or the goods shipped by another.<sup>2</sup> The rule has, however, been much questioned and has some exceptions.<sup>3</sup> Where the consignor, although not the general owner, has a lien upon or a special interest in, the goods, and makes the contract and pays the consideration for their carriage, he may bring an action for the breach of the contract in his own name, in order that he may protect his rights.<sup>4</sup>

Where the evidence does not show that the seamen were joint owners with the plaintiffs of the cargo, and it was simply testified that "they were interested in the oil," and that evidence was not sufficient to establish that they were either partners or joint owners with the plaintiffs; it is more reasonable to suppose from such evidence that they were simply interested in the proceeds of the oil; and such is believed to be the common arrangement between the owners of whaling vessels and their seamen, when the latter have an interest in the product of the whaling voyage.<sup>5</sup> In the case of *Waldron v. Willard*, 17 N. Y. 466, it was held that a cause of action against a common carrier to recover damages sustained by the plaintiff to his goods shipped upon the defendant's boats, and which were sunk in the Hudson river on their passage up, was assignable. The same is affirmed in the case of *Merrill v. Grinnell*, 30 N. Y. 594, where the general principle is re-affirmed that a right of action against a common carrier to recover the value of property entrusted to him, is assignable.

<sup>1</sup> *Allen v. Brown*, 44 N. Y. 228; *Meeker v. Claghorn*, 44 N. Y. 349; *Noe v. Christie*, 51 N. Y. 270, 274.

<sup>2</sup> *Green v. Clarke*, 12 N. Y. 343; *Krudler v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

<sup>3</sup> *Blanchard v. Page*, 8 Gray, 281; *Finn v. Western R. Corp.* 112 Mass. 524, 17 Am. Rep. 128; *Arbuckle v. Thompson*, 37 Pa. 170.

<sup>4</sup> *Swift v. Pacific Mail SS. Co.* 106 N. Y. 206.

<sup>5</sup> *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 Pick. 234; *Bishop v. Shepherd*, 23 Pick. 492; *Swift v. Pacific Mail SS. Co.* *supra*.

### § 148. *Insurance on Goods by Carrier.*

A common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured for their full value, and the policy need not specify the nature of his interest.<sup>1</sup>

No rule of law or of public policy is violated by allowing a common carrier, like any other person having the personal property or a peculiar interest in the goods, to have them insured against the usual perils, and to recover for any loss from such perils,—although occasioned by the negligence of its own servants. By obtaining insurance, it does not diminish its own responsibility to the owner of the goods, but rather increases its means of meeting that responsibility. If it were true that a ship owner, obtaining insurance by general description on his ship and the goods carried by her, could, in case of the loss of both ship and goods, by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books. But, research has failed to furnish any such precedent. Collision or stranding is, doubtless, a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them.<sup>2</sup> But a provision in a shipping contract, that the carrier in case of loss shall have the benefit of any

<sup>1</sup> *Crowley v. Cohen*, 3 Barn. & Ad. 478; *DeForest v. Fulton F. Ins. Co.* 1 Hall, 84, 110; *Waters v. Monarch L. & F. Ins. Co.* 51 El. & Bl. 870; *London & N. W. R. Co. v. Glyn*, 1 El. & El. 652; *Savage v. Corn Exchange F. & I. Ins. Co.* 36 N. Y. 655; *Joyce v. Kennard*, L. R. 7 Q. B. 78; *Com. v. Shoe & L. Dealers F. & M. Ins. Co.* 112 Mass. 131; *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 23 L. ed. 868; *North British & M. Ins. Co. v. London, L. & G. Ins. Co.* L. R. 5 Ch. Div. 569.

<sup>2</sup> *General Mut. Ins. Co. v. Sherwood*, 55 U. S. 14 How. 352, 364, 365, 14 L. ed. 452, 457; *Orient Mut. Ins. Co. v. Adams*, 123 U. S. 67, 73, 31 L. ed. 63, 66; *Copeland v. New England M. Ins. Co.* 2 Met. 432, 448-450.

insurance effected by the shipper does not apply to a loss from the carrier's negligence, where the policy expressly provides that it shall not cover the carrier's common law liability, although it provides for advancing to the shipper the insured value of the goods, to be repaid upon a recovery against the carrier.<sup>1</sup>

In one of the earliest cases in which the rule was judicially affirmed that a policy of insurance covers losses by perils insured against, though occasioned by the negligence of the servants of the insured, the assured being the owner of a ship, had chartered her for a West Indies voyage, and by the usages of trade bore the risk of bringing the cargo from the shore to the ship; the policy was upon the boats of the ship, and upon goods in them; and the amount recovered of the insurer was for goods being carried from the shore to the ship in her boats, and lost by the wrecking of the boats, in consequence of the misconduct and negligence of some of the ship's crew. Such was the state of facts to which Lord Chief Justice Abbott applied the language, cited and approved by Mr. Justice Story in *Waters v. Merchants Louisville Ins. Co.* 36 U. S. 11 Pet. 222, 9 L. ed. 695, and by Chief Justice Shaw, in *Copeland v. New England M. Ins. Co.* 2 Met. 442: "In this case, the immediate cause of the loss was the violence of the wind and waves. No decision can be cited where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions as to the *quantum* of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the masthead to look out, and he falls asleep, in consequence of which the vessel runs upon a rock or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favor of the underwriters."

<sup>1</sup> *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605.

<sup>2</sup> *Walker v. Mailland*, 5 Barn. & Ald. 171, 174, 175.



So, in the recent case of *North British M. Ins. Co. v. London, L. & G. Ins. Co.* it was assumed, as unquestionable, that insurance obtained by a wharfinger would cover a loss by his own negligence.<sup>1</sup> That a policy of marine insurance excepts negligence in navigation, is not available to the owners of a tug through whose negligence the vessel carrying the insured cargo was lost, in defense to a claim by the insurance company as subrogated to the rights of the insured.<sup>2</sup> As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, although occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but, being valid as between the owner and the carrier, it does prevent either the owner himself or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation. Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing no express stipulation on the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to two careful judgments rendered independently of each other, the one by the English court of appeal, and the other by the supreme judicial court of Massachusetts.<sup>3</sup>

In *Tate v. Hyslop*, owners of goods, insured against risks in rafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the

<sup>1</sup> L. R. 5 Ch. Div. 584.

<sup>2</sup> *Re Harris*, 57 Fed. Rep. 243.

<sup>3</sup> *Tate v. Hyslop*, 15 Q. B. Div. 368; *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728.

underwriters at the time of procuring the insurance. The sole ground upon which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. Lord Justice Brett observed that, but for the two rates established by the underwriters and known to the assured, the omission of the assured to disclose their agreement with the lighterman, could only have affected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance.<sup>1</sup> In *Jackson Co. v. Boylston Mut. Ins. Co. supra*, it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier afforded no defense to an action on the policy.<sup>2</sup> It must not be held that so much of a

<sup>1</sup> L. R. 15 Q. B. Div. 375, 376.

<sup>2</sup> *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873; *Curstairs v. Mechanics & T. Ins. Co.* 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Mut. Ins. Co. v. Calchs*, 20 N. Y. 173; *Witting v. St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 631; *Bartlett v. Pittsburg, C. & St. L. R. Co.* 94 Ind. 281; *Evansville & C. R. Co. v. Young*, 28 Ind. 516; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Boscovitz v. Adams Exp. Co.* 93 Ill. 523, 34 Am. Rep. 191; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Gulf, C. & S. F. R. Co. v. Levi*, 8 L. R. A. 323, 76 Tex. 337; *Gulf, C. & S. F. R. Co. v. Gatewood*, 10 L. R. A. 419, 79 Tex. 89; *Georgia R. Co. v. Gann*, 68 Ga. 350; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 239, 57 Am. Rep. 382; *School Dist. in Medfield v. Boston, H. & E. R. Co.* 102 Mass. 552, 3 Am. Rep. 502; *Squire v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan. 505; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 31 Am. Rep. 353; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 2 Am. Rep. 362; *Louisville & N. R. Co. v. Brownlee*, 14 Bush, 590; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Richmond & D. R. Co. v. Payne*, 6 L. R. A. 849, 86 Va. 481; *Hull v. Chicago, St. P. M. & O. R. Co.* 5 L. R. A. 587, 41 Minn. 510; *Hartwell v. Northern Pac. Exp. Co.* 3 L. R. A. 342, 5 Dak. 463; *Insurance Co. of N. A. v. Easton*, 3 L. R. A. 424, 73 Tex. 167; *Missouri Pac. R. Co. v. Ivey*, 1 L. R. A. 500, 71 Tex. 409; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Rep. 659; *Missouri Pac. R. Co. v. Vandeventer*, 3 L. R. A. 129, 26 Neb. 222; *Merchants Despatch Transp. Co. v. Bloch*, 86 Tenn. 392; *Durgin v. American Exp. Co.* (N. H.) 9 L. R. A. 453; *Annas v. Milwaukee & N. R. Co.* 67 Wis. 46; *Branch v. Wilmington & W. R. Co.* 88 N. C. 573; *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 469; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523; *Seller v. The Pacific*, 1 Or. 409; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328; *Kimball v. Rutland & B. R. Co.* 26 Vt. 256, 62 Am. Dec. 567; *Wallace v. Matthews*, 39 Ga. 617,

clause in the bill of lading as provided that "the carrier so liable shall have full benefit of any insurance that may have been effected upon or on account of said cotton"—is not invalid by reason of its contravening any rule based on public policy.<sup>1</sup>

In the case first referred to the bill of lading was prior in point of time to the policy, which recited the fact of shipment, and it was held that this was sufficient evidence that the policy was issued with notice of the right secured by the carrier by contract, and in subordination to that right. The same ruling was made in the second case cited, in which it is assumed that the contracts of carriage and insurance were made simultaneously, the insurer being ignorant of the clause in the bill of lading which subrogated the carrier to the rights of shipper under the policy. In disposing of the case the court said: "The policy contained no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy."<sup>2</sup>

In *Inman v. South Carolina R. Co. supra*, it appeared that the policy issued some time before the shipment was made, and while recognizing the validity of a contract between the shipper and carrier, whereby the latter should become entitled to the benefit of insurance made by the former in a proper case, the court said: "The policies were all taken out some weeks before the shipments

99 Am. Dec. 473; *Reno v. Hogan*, 12 B. Mon. 63, 54 Am. Rep. 513; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *Merrill v. American Exp. Co.* 62 N. H. 514; *Bethea v. Northeastern R. Co.* 26 S. C. 91; *Southern Exp. Co. v. Seide*, 67 Miss. 609, 8 Ry. & Corp. L. J. 153; *Weiller v. Pennsylvania R. Co.* 134 Pa. 310, 42 Am. & Eng. R. Cas. 390; *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449; *Lawton v. Comer*, 7 L. R. A. 55, 40 Fed. Rep. 480; *Adams Exp. Co. v. Harris*, 7 L. R. A. 214, 120 Ind. 73, substantially like the one in *Insurance Co. of N. A. v. Easton*, 3 L. R. A. 424, 73 Tex. 167.

<sup>1</sup> *British & F. M. Ins. Co. v. Gulf, C. & S. F. R. Co.* 63 Tex. 475, 51 Am. Rep. 661; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612; *Rintoul v. New York Cent. & H. R. R. Co.* 21 Blatchf. 439; *Plutt v. Richmond, Y. R. & C. R. Co.* 108 N. Y. 358; *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728.

<sup>2</sup> *Tate v. Hyslop*, L. R. 15 Q. B. Div. 368; *Jackson Co. v. Boylston Mut. Ins. Co. supra*.

were made, although, of course, they did not attach until then, and recovery upon neither of them could have been had, except upon condition of resort over against the carrier, any act of the owners to defeat which operated to cancel the liability of the insurers. They could not, therefore, be made available for the benefit of the carrier."

In *Jackson Co. v. Boylston Mut. Ins. Co.* it was assumed that the carrier might contract for the benefit of insurance secured by the shipper; and the inference to be drawn from the report of the case is that the policy made the basis of the action was issued after the right of the carrier to the benefit of insurance had attached. The shipper bought through a broker, who it seems did not read the receipts securing to the carrier the benefit of insurance. The railroad's receipts with draft attached were forwarded by the broker to the shipper, the draft cashed, notice given to the insurance company of the shipments and the policy presented, that the shipment might be evidenced thereon, which was done. This seems to have been the act which applied the insurance to the cotton destroyed while in transit, and no inquiry was made as to the terms of shipment when insurance was thus obtained. In disposing of the case the court said: "The contract between the plaintiff and the carrier was binding being conceded, we are brought to the conclusion expressed in the ruling of the judge who presided at the trial, 'that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud or concealment, and where the plaintiff itself [shipper] was actually ignorant of the stipulation relied on at the time it made the insurance or obtained the indorsement on the policy, and was ignorant when it ordered the cotton that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property *in transitu*, making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage so far as it was a lawful contract.'"

Under this state of facts it was held that the carrier by virtue

of its contract became subrogated to all rights held by the shipper against the insurer; and that thus was defeated the right of the insurer to be subrogated, on payment of the loss, to the right against the carrier, to which, but for the contract of shipment, the insurer, under the settled principles of law, would have been entitled. This case (while holding that the right of the insured, when dependent only on his relation to the carrier, to modify by contract the rule of subrogation, cannot be questioned) concedes that no contract made between the insured and the insurer whereby the right to modify the general rule of subrogation is withdrawn from the insured can be controlled by a contract between the insured and the carrier.

In *Mercantile Mut. Ins. Co. v. Calchs*, 20 N. Y. 175, it was held that a contract between a carrier and a shipper was valid; and on payment of a loss under a policy issued after the contract for carriage was made, the right of subrogation was denied to the insurer. In disposing of the case the court said: "It is argued that this clause in the contract did not exempt the carriers from liability to the plaintiffs, because it was made without their knowledge or consent and was an attempted fraud upon their rights. But this is not so in point of fact, so far as the defendants are concerned. The contract between them and the insured was made before any insurance was obtained, and though it sought to secure a right to the defendants in case policies were procured, yet on their part no fraud was contemplated on the plaintiffs; none is found by the court. It is true the case states that the plaintiffs did not know of the contract when they issued their policies; that was a matter between them and the insured. If there was any fraudulent concealment of facts on the part of the latter, at the time they obtained their insurances, it would have avoided the policies and they would not have been bound to pay the loss. If they paid it voluntarily they are not entitled to be subrogated. In this case, as in the others, but one, considered, there was no contract between the insured and insurer, at the time the contract between the carrier and the insured was made, which restrained them from modifying or entirely annulling the ordinary rule of subrogation if they saw proper to do so by contract.

The cases referred to hold : 1. That contracts, such as contained in the carrier's contract,<sup>1</sup> are valid as between the carrier and shipper. 2. That a policy issued with knowledge that the insured property is in transit, in the absence of inquiry as to the terms of shipment, misrepresentation as to this or other matter material to the risk, or fraud, will be deemed to have been issued in subordination to the contract of shipment which may control the right of the insurer to subrogation. None of them, however, hold that a contract of insurance, existing when a contract of carriage is made, whether the carrier have knowledge of the insurance contract or not, can be controlled by a subsequent contract between the insured and the carrier; and the insurer's right to subrogation thus be destroyed, even when there is no express provision in the policy which forbids this.

It must be that, in the absence of stipulation in a policy to the contrary, the insured may, without invalidating his policy, make such contracts with a carrier, limiting the liability of the latter, as may be lawful under the laws in force at the place of shipment or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight without contract limiting his liability, in so far as this may lawfully be done under the law governing the shipment. With the carrier's liability lawfully restricted by contract, a loss resulting from a cause within the restriction, would not give right of action in favor of the insured shipper against the carrier; and where this is the case there can be no subrogation under the general principles applicable to the subject.

The contract relied on by the carrier, in *Insurance Co. of N. A. v. Easton*, *supra*, was not one it had the right to have made, or, otherwise, the right to refuse to receive the cotton for transportation,<sup>2</sup> and it ought not to be presumed that the parties to the

<sup>1</sup> *Insurance Co. of N. A. v. Easton*, 3 L. R. A. 424, 73 Tex. 167.

<sup>2</sup> NOTE.—A stipulation in a bill of lading that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid and limits the right of an insurer of the goods, upon paying the loss, to recover over against the carrier; but a carrier setting up such a

insurance contract contemplated that the affreightment would be made practically at the entire risk of the insurer when the carrier had no right to insist that this should be so, and when the general rules of the law, with reference to which they ought to be presumed to have contracted, fix on the carrier the ultimate liability for a loss occurring while the freight is in his hands, unless the loss arises from a cause that relieves the carrier from liability. The carrier's liability is held to be the ultimate liability, simply because the loss of property, while in his custody as carrier, results, in fact or in legal contemplation, from his failure of duty, while that of the insurer is held to be that only of an indemnitor, in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary construction may not fairly be inferred from the time and circumstances of the contract. It seems, under the facts of that case, leaving out of consideration the warranty contained in the contract of insurance, that the right of the insurer to subrogation on payment of the loss is as well secured when there is not, as when there is, an express contract that the right to subrogation shall exist; and, that a contract between the insured and the carrier which defeats this right would defeat the right of the insured or the carrier to recover at all upon the contract of insurance.

It has been held that where a policy expressly gives the insurer the right to subrogation against the carrier, that a subsequent agreement between the insured and the carrier that the latter shall be subrogated to the right of the insured avoids the policy.<sup>1</sup> The correctness of this ruling was recognized in *Jackson Co. v. Boyston Mut. Ins. Co.* 139 Mass. 411, 52 Am. Rep. 728. If the insured wishes insurance that will place the ultimate liability on

defense must show clearly that the insurance on the goods is one to the benefit of which by the terms of his contract he is entitled. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 29 U. S. 397, 32 L. ed. 788. By the contract the owner agrees that as between him and the carrier, the latter when he has paid for the loss, may have the benefit of the insurance. *Rintoul v. New York Cent. & H. R. R. Co.* 17 Fed. Rep. 905; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173. *Curstairs v. Mechanics & T. Ins. Co.* 18 Fed. Rep. 473, 16 Am. & Eng. R. Cas. 142.

the insurer let him so make his contract as to protect the carrier afterwards to be selected by him; compensate the insurer for the increased risk of ultimate loss, and be in position to contract with the carrier for reduction in freight, such as may be proper by reason of this shifting of the ultimate risk of loss from the carrier to the insurer.

Passing from this, however, it is certainly true that the insured cannot confer on the carrier a right they do not possess. The warranty which an insurance company must seek to assert to avoid liability to the carrier is one promissory in character, in which the parties contract "that this insurance shall not inure to the benefit of any carrier." This, if a valid provision, cuts off any construction of the policy whereby it could possibly be held to confer any right to benefit under it on a carrier of the property insured, and it deprives the insured of the power to confer on such carrier any right to benefit under the policy by contract or otherwise. By the warranty the parties have contracted that the contract of insurance should be avoided, should cease to be operative—if, during the time specified for its continuance, the insured should so contract with a carrier of the property insured, as, between themselves, to give to the carrier any right to benefit under the policy. The purpose of this provision evidently was to deny, in terms, to the insured, the right of power to confer on the carrier any right to benefit through the policy, such as the cases referred to hold may be conferred on the carrier by contract with the shipper, made before insurance is obtained.

The insurer, in effect, says in the face of the policy, and to this the insured assents: "This contract shall be binding on me only so long as you refrain from contracting with any carrier you may employ to transport the insured property, that he shall have right to any indemnity from me, for loss occurring while the property is in his possession as carrier, from a cause which under the rules of law applicable to the contract of carriage would give you cause of action against such carrier; and I will not be longer bound, by this contract, if you in any manner release such carrier from that full liability to you and to me which will exist under a lawful contract of affreightment for loss of the insured property while



in his hands as carrier." By requiring the carrier's liability to continue the ultimate liability, the insurer doubtless intended to make the carrier's own interest some guaranty against its own negligence or misconduct. In the very act of making the contract, through which the carrier claims, the policy ceased to be of any effect whatever, as to the particular cotton at least; and from that time forward neither the insured nor the carrier could assert right under it based on the particular loss, if the warranty was valid. An insurance company is under no legal obligation to issue a policy at all, but if it does it has the right to place a provision in the policy such as it did; and in so doing it neither contravened any public policy nor restrained trade.

If it is said that the carrier may have had no notice of the clause in the policy, and that for this reason it would be contrary to public policy to permit it now to rely upon the warranty, the sufficient answer is that the law does not require that notice shall be given to third persons of contracts of insurance, nor does it provide a mode in which such notice may be given whereby all persons will be bound. If the want of notice of a contract become important in a contest between a party to it and a third person, who has sought to acquire by contract an interest or right antagonistic to the right the former contract gives, it is not because the former contract was illegal, but because some equitable consideration has arisen on account of which the person who has kept secret his right ought not to be permitted to assert it against one whom he has misled by his silence. If the mere want of notice of contracts would place them on the list of contracts condemned because contrary to public policy, then there would be a long list of condemned contracts, not heretofore even suspected of illegality. The carrier knows that no right can be acquired against the insurer through a contract with the insured other than the latter possessed and has power to convey, and if it desires to know the extent of that right it is its duty to inquire. Neither the knowledge of nor privity of the carrier to the insurance contract is necessary to its legality. The carrier has no legal right, recognized or unrecognized, to have the insurance company or the insured to make any contract of insurance whatever, much less to

make one the insurance company is under no obligation to make, and has refused to make. The terms of the policy neither restrains this carrier nor any other carrier from making lawful contracts for carriage at any place, nor from carrying them out anywhere; they simply deny to the insured the right to make a contract which will bind the insurer as the carrier desires it to be bound.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter under them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary.<sup>1</sup> The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the will incident thereto the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the right of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner.<sup>2</sup>

<sup>1</sup> *Hall v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 369, 20 L. ed. 594.

<sup>2</sup> NOTE.—Where an owner insured, and damaged by perils insured against, abandons all "*spes recuperandi*" to the underwriter, the latter on paying the loss is entitled to be subrogated to all the rights of the insured to recover against third parties who caused the damage. *Home Ins. Co. v. Western Transp. Co.* 4 Robt. 267; *Atlantic Ins. Co. v. Storrow*, 1 Edw. Ch. 621, 5 Paige, 285; *New York L. Ins. Co. v. Roulet*, 24 Wend. 513; *Rogers v. Hosack*, 18 Wend. 319; *Aetna F. Ins. Co. v. Tyler*, 16 Wend. 385, 30 Am. Dec. 90; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612. The entire destruction of the subject of insurance or the payment of the loss has been considered equipollent with an abandonment in giving the insurer such right of subrogation. *New York v. Pentz*,

Hence, it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss.<sup>1</sup> But it is equally well settled that the right by way of subrogation of an insurer upon paying for a total loss of the goods insured to recover over against the carrier, is only that right which the assured has, and that accordingly when a bill of lading provides that the carrier, when liable for the loss shall have the full benefit of any insurance that may have been effected upon the goods, this provision is valid, as between the carrier and the shipper; and that, therefore, such provision limits the right of subrogation of the insurer, upon paying the shipper the loss, to recover over against the carrier.<sup>2</sup>

If a valid claim by the underwriter to be subrogated to the rights of the owner will not arise where the carrier has contracted with the owner that he, the carrier, shall have the benefit of any insurance, it would seem to be clear that where the carrier is actually and in terms the party insured, the underwriter can have no right to recover over against the carrier, even if the amount of the policy has been paid by the insurance company to the owner on the order of the carrier.<sup>3</sup> The owner of a cargo destroyed by fire through the negligence of a vessel to which it has been delivered is not divested of title so as to prevent his recovery for the loss, by an arrangement under which the insurer of the cargo advances him its value as a loan without interest, upon

24 Wend. 668; *New York L. Ins. Co. v. Roulet*, *supra*. The insurers are subrogated to the rights of the insured against the carrier for the loss and damage to the cargo insured by them. *Phillips, Ins.* 1723; *Home Ins. Co. v. Western Transp. Co.* 4 Robt. 257; *Hull v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 367, 370, 373, 20 L. ed. 594-597; *The Potomac v. Cannon*, 105 U. S. 630, 26 L. ed. 1194; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 320, 29 L. ed. 873, 878; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* ("The Montana") 129 U. S. 397, 32 L. ed. 788.

<sup>1</sup> *Hull v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 369, 20 L. ed. 594.

<sup>2</sup> *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873; *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

<sup>3</sup> *Providence Ins. Co. v. Morse*, 150 U. S. 99, 37 L. ed. 1013.

the understanding that he shall prosecute the claim and, if successful, pay the loan, but, if unsuccessful, the loan shall be considered payment of the insurance.<sup>1</sup> An advance of the insured value by an insurer to a shipper of goods, pending the determination of the carrier's liability for their loss, is not a payment of the insurance which can be pleaded in avoidance of such liability, where the policy stipulates that it shall not cover the carrier's common law liability, and that the insured shall be reimbursed out of the recovery, if any, against the carrier.<sup>2</sup>

A stamp upon a bill of lading, stating that the property is insured between certain ports in a certain amount, upon which the premium is paid, is not a contract of insurance constituting a valued policy, but an agreement to effect insurance, which is complied with by procuring proper insurance in any proper company, where it is customary for carriers to make the latter undertaking, and there is nothing to indicate that either party expected that anything more should be done.<sup>3</sup> No rights of a shipper growing out of a contract between the carrier and its agents that the latter shall procure insurance on the shipper's property while in its possession as such agent, can be adjusted, as between the shipper and agent, in case of the loss of the property by fire, unless the carrier has been sued and its liability for the loss established.<sup>4</sup>

Where an action is brought by the owner of goods against the carrier for the loss of the goods by fire, for the use of the insurer, who has paid the insurance money to the owner, the recovery is not limited to the amount of the policy, but will be for the entire loss sustained by the nominal plaintiffs without regard to the amount of insurance paid. A payment by the insurer to the insured of property lost while in the possession of a common carrier does not discharge the liability of the common carrier.<sup>5</sup> Satisfaction received from the insurer for a sunken vessel is no

<sup>1</sup> *The Guiding Star*, 53 Fed. Rep. 936.

<sup>2</sup> *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605.

<sup>3</sup> *Marquardt v. French*, 53 Fed. Rep. 603.

<sup>4</sup> *Deming v. Merchants Cotton Press & S. Co.* 13 L. R. A. 518, 90 Tenn. 306.

<sup>5</sup> *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527.

defense in mitigation of damages for the collision.<sup>1</sup> Under a bill of lading entitling the carrier to insurance, the payment of the insurance to the owner of the property discharges the carrier from all liability, and the insurance company can have no action against the carrier.<sup>2</sup> Where, by a collision between two vessels by their mutual fault, a third vessel was injured or her cargo lost, on a libel by the insurer of the cargo against one of the offending vessels she is liable for the whole damage. The rule of the division of damages does not apply. It is a marine tort, and each is jointly and severally liable.<sup>3</sup>

### § 149. *Liability of Carrier of Goods.*

The liability of the carrier of goods has been pointed out in the preceding sections and it is only necessary to refer to a few general principles at this time. Thus, the general rule is that a carrier cannot by agreement escape liability for loss from negligence or malfeasance of himself or his employes.<sup>4</sup> And even where this is permitted, a shipping contract, though made at a reduced rate and providing for the exemption of the carrier from liability for its negligence, will not exempt it from any kind or sort of negligence not specifically and expressly stated in the contract.<sup>5</sup> A foreign vessel shipping a cargo in the United States for transportation to a foreign port cannot make a provision of the bill of lading exempting her from liability for her own negligence operative by a further provision that all questions arising under the contract shall be decided according to the laws of the country to which she belongs, by which such a stipulation is valid.<sup>6</sup>

A carrier is not relieved from liability for loss of freight by its negligence by the fact that the freight was shipped under a con-

<sup>1</sup> *The Monticello v. Mollison*, 58 U. S. 17 How. 153, 15 L. ed. 68.

<sup>2</sup> *Platt v. Richmond, Y. R. & C. R. Co.* 108 N. Y. 358.

<sup>3</sup> *Phoenix Ins. Co. v. The Atlas*, 93 U. S. 302, 23 L. ed. 863; *United States v. The Juniata* ("The Juniata") 93 U. S. 337, 23 L. ed. 930.

<sup>4</sup> *Milton v. Denver & R. G. R. Co.* 1 Colo. App. 307.

<sup>5</sup> *Zimmer v. New York Cent. & H. R. R. Co.* 42 N. Y. S. R. 63.

<sup>6</sup> *The Iowa*, 50 Fed. Rep. 561.

tract for a special rate and rebate in violation of the Interstate Commerce Law.<sup>1</sup> A carrier is liable in trover for goods delivered to the consignee in violation of instructions from the shipper not to deliver them without a bill of lading.<sup>2</sup> Payment of an overcharge of freight to a railroad company engaged as a common carrier of goods is not voluntary so as to prevent recovering it.<sup>3</sup>

Damages for breach by the carrier of a written contract under which cattle were shipped, cannot be recovered in an action for breach of a prior oral contract to transport them at a certain time.<sup>4</sup> A common carrier wrongfully refusing to receive freight is not liable for damage resulting from the ravages of the weather, as it is the duty of the shipper to protect it properly, the carrier being liable for the reasonable expense therefor.<sup>5</sup> Damages cannot be recovered in an action for breach of a contract to furnish on a certain day a car for the shipment of cattle, for negligent shipment under a contract thereafter entered into.<sup>6</sup> A railroad company is not liable for injury to freight resulting from exposure to mud and rain in consequence of the company's violation of its contract with the road over which the freight was shipped, to maintain a narrow-gauge track for the benefit of that road, as the exposure and not the failure to maintain the track is the proximate cause of injury.<sup>7</sup>

The liability of the Crown for loss of or injury to goods carried by a government railway, through the negligence of the persons in charge of the train, is purely statutory; but under 50 & 51 Vict. chap. 16, a petition of right will lie therefor.<sup>8</sup> Where a railway company agreed with a compress company to receive and transport all cotton brought by its owners to the compress com-

<sup>1</sup> *Insurance Co. of N. A. v. Delaware Mut. S. Ins. Co.* 91 Tenn. 537.

<sup>2</sup> *Foggan v. Lake Shore & M. S. R. Co.* 40 N. Y. S. R. 718.

<sup>3</sup> *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 18 L. R. A. 105, 132 Ind. 517.

<sup>4</sup> *Waters v. Richmond & D. R. Co.* 16 L. R. A. 834, 110 N. C. 338.

<sup>5</sup> *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 12 Ry. & Corp. L. J. 110.

<sup>6</sup> *Waters v. Richmond & D. R. Co. supra.*

<sup>7</sup> *St. Louis, A. & T. R. Co. v. Neel, supra.*

<sup>8</sup> *Lavoie v. Reg.* 3 Can. Exch. 96.

pany, the railway company is not liable to the owners or insurers of such cotton for its destruction by fire, during its delay to furnish the transportation, such delay not being the direct and proximate cause of the loss by fire.<sup>1</sup> A shipowner who, to exonerate himself, has, as bailee of the cargo, recovered and received from the owner of another vessel, in a suit in admiralty for damages for a collision, the value of the cargo, as well as damages for injury to his ship, is answerable to the owner of the cargo, or to the insurer subrogated to such owner's right, for the whole value thereof so received, without deduction for the expenses of the litigation in which it was obtained.<sup>2</sup>

In a recent case, the appellant brought suit to recover of the appellees, as receivers of the International Great Northern Railroad Company, damages for a failure to deliver promptly the body of her deceased husband under a contract with her for its carriage from San Antonio to Jefferson. She alleged in her petition, in substance, that her husband died at Boerne; that at the time they were sojourning at that place on account of his health, but that their home was in Jefferson; that she caused his body to be inclosed in a metallic casket, and conveyed to San Antonio, where she immediately entered into contract with the agent of defendants for its carriage to Jefferson, by paying for and procuring a first class passenger ticket to that place, known and marked as a "corpse" ticket; and that at the same time she procured tickets for herself and attendants over the same line to the same place. It was also alleged that on the 12th day of the same month the body was delivered to the agents of the defendants, and placed on board the train; that she took the same train, and arrived at an early hour the next morning at the depot at Jefferson, where her relatives and many friends were in waiting to accompany her dead husband to her home; but that, to her great mortification and distress of mind, she then ascertained that the casket containing the body had not arrived. It was further averred that, as she subsequently ascertained, the body,

<sup>1</sup> *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.* 139 U. S. 223, 35 L. ed. 154.

<sup>2</sup> *Hardman v. Brett*, 2 L. R. A. 173, 37 Fed. Rep. 803

instead of having been sent forward by the train upon which she was carried, as should have been done, was, through the negligence of the defendants' agents or servants, placed in a box car, and left upon the side track at Palestine, an intermediate station, that did not reach Jefferson until the 14th of the month; and that on account of its advanced state of decomposition, resulting from the delay, "it was with great difficulty and much additional pain and distress of mind, that her and his friends could decently inter the said remains." The petition claims damages for mental distress and prayed also for a recovery of exemplary damages. A demurrer to the petition was sustained by the court, and the plaintiff having declined to amend, her suit was dismissed. On appeal she complains of the ruling of the court upon the demurrer and asks a reversal of the judgment. The court is unable to distinguish in principle this case from those in which recoveries against telegraph companies have been allowed for failure to deliver with promptness messages announcing the death or mortal illness of near relatives. Such cases are exceptional. As a rule, mental suffering is not an element of the damages which are recoverable for breach of a contract, or, in an action for tort, founded upon a right growing out of a contract. Ordinarily, the object of sending a telegraphic message announcing the death or sickness of a relative is to afford the person to be benefited the solace that may result from being present during the last illness of the relative, or attending his obsequies, as the case may be. The direct result of the failure to perform the duty of delivering the message being to deprive the person addressed of this solace, and to cause distress of mind, it is not unreasonable that he should have his compensation therefor. It is upon this principle that the decisions of courts in the telegraphic cases are to be maintained. The same principle, it is said, applies in this case. But, however that may be, there is no valid reason why, if a recovery can be had for mental suffering resulting from the failure to deliver a telegraph message announcing the death, like damages should be denied in this. In the case of *Western U. Teleg. Co. v. Simpson*, 73 Tex. 422, the resulting injury was somewhat similar to that in the present case. But it is insisted



that the mental suffering for which a recovery was sustained in that case was the immediate result of the delay in securing the money which the company had contracted to deliver. Some disagreeable mental emotion is the ordinary result of the failure to pay or deliver money according to promise. But the measure of damages for the breach of the contract is the money to be paid or delivered with the interest. It was the fact that the plaintiff was detained in a distant state, watching over the body of her deceased husband, which sustained the recovery in that case.<sup>1</sup>

### § 150. *Presumption from Loss of Goods—Burden of Proof.*

The question on whom rests the burden of proof where articles are damaged or lost by a carrier from a cause excepted in its bill of lading, has been already considered in § 49, *ante*. The plaintiff's ownership of the property, its delivery to the defendant for transportation, and its acceptance for that purpose, and its non-delivery to the consignees, are *prima facie* evidence of negligence. The burden is therefore upon the defendant to show facts exempting it from liability.<sup>2</sup> If property has been delivered to the carrier or his duly authorized agents, and it has not been delivered by him to the consignee, this is *prima facie* evidence of negligence and liability.<sup>3</sup> It is not enough to show the loss might have been occasioned by an excepted peril. It must be shown *prima facie* that it was so caused.<sup>4</sup>

The nondelivery by a carrier of goods which it has undertaken to transport is presumptive evidence of negligence on its part, in

<sup>1</sup> *Hale v. Bonner*, 14 L. R. A. 336, 82 Tex. 33.

<sup>2</sup> *Little v. Boston & M. R. Co.* 66 Me. 241; *Murphy v. Staton*, 3 Munf. 239; *Forcard v. Pettard*, 1 Term Rep. 33.

<sup>3</sup> *Witting v. St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 631; *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360; *Rich v. Lambert*, 53 U. S. 12 How. 347, 13 L. ed. 1017; *Clark v. Barnicell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Arend v. Liverpool, N. Y. & P. S. S. Co.* 6 Lans. 457; *The Emma Johnson*, 1 Sprague, 527; *Tygart Co. v. The Charles P. Sinnickson*, 24 Fed. Rep. 304; *Hunt v. The Cleveland*, 6 McLean, 76; *Ewart v. Street*, 2 Bail. L. 157; 23 Am. Dec. 131; *The Compta*, 4 Sawy. 375; *Kirby v. Adams Exp. Co.* 2 Mo. App. 369; *The Live Yankee*, Deady, 420.

<sup>4</sup> *The Compta* and *The Live Yankee*, *supra*; *The Juniata Paton*, 1 Biss. 15.

the absence of any evidence showing the circumstances of the loss.<sup>1</sup> Where goods are lost or injured while in the custody of a common carrier a presumption of negligence on his part arises, in the absence of evidence accounting for the loss in such a way that his negligence cannot be inferred.<sup>2</sup> In case of loss of goods during transportation, the presumption as to liability is against the carrier.<sup>3</sup> In claiming exemption from liability for an admitted loss, a shipowner who pleads peril of the sea has the burden of proof to bring the loss within the exemption.<sup>4</sup> It is frequently difficult to show cause of the loss or damage done in order to fix the liability of the carrier,<sup>5</sup> and the burden of proof is cast upon him to show that the loss resulted from such causes as will exempt him from responsibility.<sup>6</sup> If it is satisfactorily shown that the loss arose from one of the excepted causes, such as flood or fire, the carrier is relieved of liability without proving affirmatively that he was guilty of no negligence.<sup>7</sup> The proof of such negligence, if the negligence is alleged to exist, rests on the party asserting it.<sup>8</sup> The jury is entitled to infer negligence on the part

<sup>1</sup> *Browning v. Goodrich Transp. Co.* 10 L. R. A. 415, 78 Wis. 391.

<sup>2</sup> *Grogan v. Adams Exp. Co.* 114 Pa. 523, 60 Am. Rep. 360.

<sup>3</sup> *Inman v. South Carolina R. Co.* 129 U. S. 128, 32 L. ed. 612.

<sup>4</sup> *The Charles J. Willard*, 38 Fed. Rep. 759; *The Mollie Mohler v. Home Ins. Co.* ("The Mohler") 88 U. S. 21 Wall. 230, 22 L. ed. 485; *Horland v. Greenway*, 63 U. S. 22 How. 491, 16 L. ed. 391; *Whitesides v. Russell*, 8 Watts & S. 44; *Van Winkle v. South Carolina R. Co.* 38 Ga. 32; *Davidson v. Graham*, 2 Ohio St. 141; *Peck v. Weeks*, 34 Conn. 152; *Stokes v. Salloustaill*, 38 U. S. 13 Pet. 181, 10 L. ed. 115; *Hastings v. Pepper*, 11 Pick. 41.

<sup>5</sup> See *Ringgold v. Haven*, 1 Cal. 108; *Midland R. Co. v. Bromley*, 17 C. B. 376; *Woodbury v. Frink*, 14 Ill. 279.

<sup>6</sup> *Chapman v. New Orleans, J. & G. N. R. Co.* 21 La. Ann. 224, 99 Am. Dec. 722; *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293; *Ewart v. Street*, 2 Bail. L. 161, 23 Am. Dec. 131; *King v. Shepherd*, 3 Story, 356; *Winne v. Illinois Cent. R. Co.* 31 Iowa, 583; *Hall v. Cheney*, 36 N. H. 27; *Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. Dec. 87; *Tarbox v. Eastern S. B. Co.* 50 Me. 339; *Cameron v. Rich*, 4 Strobb. L. 168, 53 Am. Dec. 670; *Bazin v. The Steamship Co.* 3 Wall. Jr. 229.

<sup>7</sup> *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909.

<sup>8</sup> *Farnham v. Camden & A. R. Co.* 55 Pa. 59; *Western Transp. Co. v. Dooner*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Colton v. Cleveland & P. R. Co.* 67 Pa. 211, 5 Am. Rep. 424; *Patterson v. Clyde*, 67 Pa. 500; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Childs v. Little Miami R. Co.* 1 Cin. S. C. (Ohio) 480; *Clark v. Burnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Lamb v.*

of a carrier whose contract provides exemption from liability, not for loss or damage from any particular cause, but as to amount of loss only, where he does not attempt to account for the failure to deliver the property.<sup>1</sup>

But even when *prima facie* proof has been thus made, it has been held that, when the common carrier relies upon a contract exemption, he must bring himself within the exemption, and that he does not do this by simply showing that the goods were lost, or destroyed, or injured, by the excepted peril or accident, but that he must go further, and show that he was free from any negligence contributing to the loss or injury. The strict rule of liability of the common carrier exacted by the common law, was imposed largely as the result of experience and from considerations of sound public policy. A common carrier is engaged in a public employment and is privileged and protected therein. Ordinarily one who delivers to him goods, parts entirely, where the rigid rule is enforced, with his possession and control of them, and can know nothing of what takes place during the carriage, while the carrier has possession and control over them, and is supposed to know, because he has the means of knowing, what happens to them, and if they are lost or injured, how it occurred. The common law recognized the danger of negligence in case of collusion and fraud between the carrier and his servants or others, which might leave the owner practically dependent upon the good faith of the carrier when he was required to prove such absolute want of good faith and actual negligence or fraud. To make such proof he would ordinarily have to rely upon the evidence of the very men whose negligence or criminality caused the injury. To prevent this failure of proof and of justice the law excused the carrier only upon his proving that the loss or damage occurred from the act of God or the public enemy, —causes for which he could not be supposed to be responsible. The reasons which require the carrier to excuse himself for his

*Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327, reversing 2 Daly, 454. See *Westcott v. Fargo*, 63 Barb. 349, 6 Lans. 319, affirmed 61 N. Y. 542, 19 Am. Rep. 300; *Lewis v. Smith*, 107 Mass. 334.

<sup>1</sup> *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 45 Alb. L. J. 412.

failure would seem to apply with as much force to a case of full common law liability.<sup>1</sup>

In an action to recover from a carrier damages for the loss of a package for which it has given a bill of lading which exempts it from liability for the dangers of navigation, fire, collision or delivery, except to land goods on dock or pier, the burden is upon the company to show that the package was so landed.<sup>2</sup> Inasmuch as the facts are peculiarly within the carrier's knowledge, it is urged that proof should come primarily from him. In an action for damages for injury to goods, the owner must show that they were delivered to the carrier in good condition, in order to establish the fact of injury.<sup>3</sup> This being shown, the better rule holds it sufficient for the carrier to show that the loss was occasioned by some accident or peril, from liability for which he is exempted, either by his contract or by law; and that he is not required to go further and show, in addition, that he was free from negligence contributing to the loss or damage.<sup>4</sup> By this rule

<sup>1</sup> The following are some of the cases which support this doctrine: *Brown v. Adams Exp. Co.* 15 W. Va. 812; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Baker v. Brinson*, 9 Rich. L. 201, 67 Am. Dec. 548; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611.

<sup>2</sup> *Browning v. Goodrich Transp. Co.* 10 L. R. A. 415, 78 Wis. 391; *Berry v. Cooper*, 28 Ga. 543; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 Am. Rep. 428; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Grey v. Mobile Trade Co.* 55 Ala. 387, 28 Am. Rep. 729; *Mobile & O. R. Co. v. Jarboe*, 41 Ala. 644; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552.

<sup>3</sup> *Smith v. New York Cent. R. Co.* 43 Barb. 255.

<sup>4</sup> The following are some of the cases which assert this doctrine: *Witting v. St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 631; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199 (overruling *Levering v. Union Transp. & Ins. Co.* 42 Mo. 88, 97 Am. Dec. 320, and *Ketchum v. American Merchants Union Exp. Co.* 52 Mo. 390); *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 327; *Whitworth v. Erie R. Co.* 87 N. Y. 413; *Canfield v. Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268; *Bunkard v. Baltimore & O. R. Co.* 34 Md. 197; *Furnham v. Camden & A. R. Co.* 55 Pa. 53; *Patterson v. Clyde*, 67 Pa. 500; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 526; *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 375; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 909; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160; *Marx v. The Britannia*, 34 Fed. Rep. 906; *French v. Buffalo & E. R. Co.* 2 Abb. App. Dec. 196; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 228, 50 Am. Dec. 659; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *The Adriatic*, 16 Blatchf. 424; *The Barracouta*, 39 Fed. Rep. 288; *Price v. The Uriel*, 10 La. Ann. 413; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 340.

a peril of navigation having caused the loss, the defendant is *prima facie* relieved from liability. There is no presumption from a loss occurring in this way that there has been negligence on the part of the defendant.<sup>1</sup> Where goods are shipped under a contract exempting the carrier from liability for the breakage of certain kinds of goods, and are delivered to the consignee in a broken condition, if the carrier shows that the broken articles are within the exception of the contract, the owner, to recover for their loss, must show that the carrier's negligence was the sole or an active co-operating cause in producing the damage. The law does not, in such cases, presume negligence from the fact of the breakage so as to cast the burden of proving its absence on the carrier.<sup>2</sup> If plaintiff shows delivery of his goods to a carrier, and a subsequent loss thereof, it is sufficient to make out a *prima facie* case; and the burden of proof is then upon the carrier to bring the case within one of the exceptions to its liability; and having done so, the burden is then on the plaintiff to show that some specific negligence with reference to the goods, on the part of the defendant, actively co-operated with the "act of God" to produce the injury.<sup>3</sup> A carrier's negligence will not be presumed, except upon proof of the happening of an injury which the exercise of proper care by the carrier could have prevented.<sup>4</sup>

The weight of authority and perhaps principle seems to sustain the proposition that when the loss occurs from any of the causes excepted in the undertaking, the exception must be the proximate cause of the loss, and the sole cause. And where the loss is attributable to such cause, still, if the negligence of the carrier mingles with it as an active and co-operating cause, he is responsible. When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized as an exception. This shown, it is

<sup>1</sup> *Clark v. Barnwell*, 53 U. S. 12 How. 272, 13 L. ed. 985; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160.

<sup>2</sup> *Witting v. St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 631, 42 Alb. L. J. 511, note.

<sup>3</sup> *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 340; *Ryan v. Missouri, K. & T. R. Co.* 65 Tex. 13, 57 Am. Rep. 589.

<sup>4</sup> *Pennsylvania R. Co. v. Resjordan*, 119 Pa. 577.

prima facie an exoneration, and he is not required to go further and prove affirmatively that he was guilty of no negligence. The proof of such negligence, if negligence is asserted to exist, rests on the other party. In a suit to recover damages for the breakage of an article while in a carrier's possession for transportation, the success of which depends upon showing negligence on the part of the carrier, a demurrer to the evidence is properly overruled if it tends to show that the article was delivered to the carrier in good condition properly packed, and that it reached its destination badly broken, the crate in which it was packed being broken on one side while one of the inside stays was broken and others out of place.<sup>1</sup>

Frequently the proof of the loss may show a condition of the means of transportation which creates a presumption of negligence on the part of the carrier. The fact of a breakage or leakage of casks of wine shipped by a vessel creates no presumption of negligence on the part of the carrier, in the absence of proof that the casks were of requisite strength to resist the ordinary handling upon the ship.<sup>2</sup> A wet cargo without storms may indicate prima facie an unseaworthy vessel.<sup>3</sup> Or rough weather may require the proof of negligence in stowage to create a presumption of negligence.<sup>4</sup>

In an action against a common carrier for the loss of goods, his receipt of the goods may be proved, without producing a bill of lading or accounting for the failure to produce it.<sup>5</sup> An unauthenticated bill of lading signed only by the master, containing the words "weight and contents unknown," is not, where the master

<sup>1</sup> *Witting v. St. Louis & S. F. R. Co.* 10 L. R. A. 602, 101 Mo. 631; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199.

<sup>2</sup> *Roth v. Hamburg American Packet Co.* 27 Jones & S. 49.

<sup>3</sup> *Cameron v. Rich*, 4 Strobb. L. 168, 53 Am. Dec. 670. See *Blanchard v. Western U. Teleg. Co.* 60 N. Y. 510; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282.

<sup>4</sup> *The Wilhelmina*, 3 Ben. 110. See, as to such conditions, *The Polynesia*, 30 Fed. Rep. 210; *The Vicid*, 4 Ben. 319; *The Delhi*, 4 Ben. 345; *The Bellona*, 4 Benn. 503; *Six Hundred and Thirty Quarter Casks of Sherry Wine*, 14 Blatchf. 517; *The Adriatic*, 16 Blatchf. 424; *Ketchum v. American Merchant Union Exp. Co.* 52 Mo. 390; *Western Transp. Co. v. Downer*, 78 U. S. 11 Wall. 129, 20 L. ed. 160.

<sup>5</sup> *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

is alive at the trial of the action, competent evidence, as against the insurer, of the kind or quantity of the cargo or the amount of freight due upon its delivery to the consignee.<sup>1</sup> The admission of evidence for the purpose of proving the identity of goods delivered to, and lost by, a common carrier, in an action brought to recover damages for such loss, will not, although improperly admitted, cause a reversal of a judgment against the carrier, if the identity of the goods was sufficiently established by other testimony in the case.<sup>2</sup> Where the action is against the carrier for refusal to furnish means for transportation, and his defense is the special hazard existing along the line, or an unusual pressure of business which has exhausted his means, the burden of establishing such facts is upon the carrier, and it will also be necessary for him—where he has had sufficient notice of the demand—to offer proof that he made proper efforts to comply with the notices and gave the shipper reasonable information of his anticipated failure.<sup>3</sup> A carrier sued for failure to deliver freight in proper time according to contract may show as a defense an impossibility to deliver the freight before it did so, because of a strike on the road and a consequent interference with its operation.<sup>4</sup>

A statute, requiring a railroad company, in order to relieve itself from liability for loss of goods, delivered to it for transportation over its own and connecting roads, to produce a receipt therefor from the corporation to whom it was its duty to deliver the goods in the regular course of transportation, includes a steamship company among the corporations from whom receipts must be produced, when such company happens to form one of the common carriers in a through line of transportation agreed on by the parties, although the statute does not in terms mention steamship lines. But delay of a railroad company in producing upon request a receipt for lost goods from a steamship company to which it was the company's duty to deliver them, caused by mistake in producing the receipt of the first railroad company beyond it in

<sup>1</sup> *Palmer v. Great Western Ins. Co.* 116 N. Y. 599.

<sup>2</sup> *Browning v. Goodrich Transp. Co.* 10 L. R. A. 415, 78 Wis. 391.

<sup>3</sup> *Ayres v. Chicago & N. W. R. Co.* 71 Wis. 372.

<sup>4</sup> *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.

the line of transportation, is not such "willful failure and refusal" to deliver the receipt as will deprive the company of the benefit of a statutory provision permitting the initial carrier to relieve itself from liability for loss by the production of such receipt, where from the terms of the Act it was very doubtful whether or not the receipt of the steamship company would suffice and the Act had never been judicially construed.<sup>1</sup> Where a common carrier sued for failure to deliver goods fails to deny under oath allegations by plaintiff that a written contract set up by plaintiff was made with him by a railroad agent of a company which is not a defendant, and that he was acting as agent also for defendant, and that defendant was connecting carrier with the contracting company, each acting for the other in contracting for transportation, no evidence is necessary on that issue for plaintiff.<sup>2</sup>

### § 151. *Damages for Loss, Injury, or Delay of Goods.*

A party suffering damage from the negligence of the carrier, should make a reasonable effort to reduce the damages as much as possible.<sup>3</sup> A carrier is liable for damages to goods from the time they are received, not merely from the date of the bill of lading.<sup>4</sup> For goods not delivered, the rule of damages is the value of the goods at the place to which they were to be carried, at the time they should have reached there—less the freight.<sup>5</sup> In an action against a carrier for the loss of goods, the measure of damages is the value of the goods in the place where they were to have been delivered, with interest.<sup>6</sup> A carrier's liability for the value, at the place of destination, of goods lost in transportation, cannot under

<sup>1</sup> *Miller v South Carolina R. Co.* 9 L. R. A. 833, 33 S. C. 359.

<sup>2</sup> *International & G. N. R. Co. v. Tisdale*, 4 L. R. A. 545, 74 Tex. 8.

<sup>3</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

<sup>4</sup> *St. Louis, A. & T. R. Co. v. Neel*, 56 Ark. 279, 12 Ry. & Corp. L. J. 110.

<sup>5</sup> *Michigan S. & N. I. R. Co. v. Custer*, 13 Ind. 167; *Holden v. New York Cent. R. Co.* 54 N. Y. 662; *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58, 5 Am. Rep. 83; *Medbury v. New York & E. R. Co.* 26 Barb. 564.

<sup>6</sup> *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 28 L. ed. 527; *The Telegraph v. Gordon* ("The Vaughan & The Telegraph") 81 U. S. 14 Wall. 258, 20 L. ed 807.



the Texas statute be limited by a clause in the bill of lading that such value shall be estimated as at the place of shipment.<sup>1</sup> A vessel owner who has received in England the proceeds of a cargo shipped from the United States and sold after collision is accountable only for their value in American money at the date of receipt, and his liability cannot be either increased or diminished by subsequent variation in the rate of exchange.<sup>2</sup>

The statute of a state, prohibiting a class of goods from being shipped therein, will not excuse a carrier having no knowledge of the statute, for negligence in transporting the goods; but the statute may be considered in placing the value upon the goods at the place of destination.<sup>3</sup> The value agreed upon in consideration of the reduced rate fixes the rule of damages.<sup>4</sup> Evidence of conversations and conduct may be introduced to show an agreement as to value, and may operate as an estoppel.<sup>5</sup> Silence may form an estoppel as well as speech.<sup>6</sup> There are exceptions to the general rule that the injury to goods is to be compensated by the difference between the market value as delivered and the value if they had been delivered uninjured, and it will be permitted to allow only the cost of putting the goods in salable condition where this will enable the consignee to recover the value as merchantable goods and he pursues this method. Where the goods have only suffered such injury on their arrival at the place of destination, as will require some expense in putting them into marketable condition, the rule of damages is the cost so incurred;—the evidence being that such expenditure would reduce the dam-

<sup>1</sup> *Gulf. C. & S. F. R. Co. v. Booton* (Tex. App.) March 18, 1891; *Taylor, B. & H. R. Co. v. Montgomery* (Tex. App.) April 29, 1891; *Taylor, B. & H. R. Co. v. Sublett* (Tex. App.) April 29, 1891.

<sup>2</sup> *The Weatherby*, 48 Fed. Rep. 734.

<sup>3</sup> *Mann v. Birchard*, 40 Vt. 336.

<sup>4</sup> *Squire v. New York Cent. R. Co.* 98 Mass. 243, 93 Am. Dec. 162; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63. See ante, §§ 50, 52.

<sup>5</sup> *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33, 50 Am. Rep. 282; *Magnin v. Dinsmore*, 62 N. Y. 35, 44, 20 Am. Rep. 442, 70 N. Y. 410, 26 Am. Rep. 608; *Lawrence v. New York, P. & B. R. Co.* 36 Conn. 63, 74; *Duntley v. Boston & M. R. Co.* (N. H.) 9 L. R. A. 449.

<sup>6</sup> *Roe v. Jerome*, 18 Conn. 153; *Taylor v. Ely*, 25 Conn. 258; *Magnin v. Dinsmore*, *supra*.

age, and thus be beneficial to the carrier.<sup>1</sup> The rule is, that a common carrier is not liable for the entire value of property injured, unless the character of the property is essentially changed by the injury, so that it can no longer be applied to the ordinary uses of such property;—but its liability will be for its decreased value, by reason of being rendered unfit for some particular use.<sup>2</sup>

If goods are shipped to be sold, the enhanced price at the place of delivery is to be considered in estimating the damages.<sup>3</sup> Where the carrier accepts goods which he knows are to be sold, if they reach the market in reasonable time, the measure of damages for breach, by which the consignor loses the sale, is the difference between the contract price and the value of the goods when actually delivered.<sup>4</sup> Where there has been delay in the transportation of goods, when they might have arrived by the exercise of proper diligence, the decline of the goods in their market value between the time when they actually arrived at the place of destination and when they should have arrived, is a material element proper to consider in ascertaining the actual damages.<sup>5</sup> But such delay in the transportation of goods, will not authorize a recovery for the time and expenses of an agent and team while waiting for the goods at the place of destination, unless the carrier had notice that there would be such expense incurred.<sup>6</sup>

The rent of a house and the expenses of an agent in gathering a cargo of dates lost in a collision are allowable as part of the damages sustained by the collision, where it is necessary, to obtain the dates, to send an expedition in charge of such agent into a country where there are no accommodations, and the house is made necessary for the business, although it is rented for a term

<sup>1</sup> *Winn v. Illinois Cent. R. Co.* 31 Iowa, 582.

<sup>2</sup> *Hackett v. Boston, C. & M. R. Co.* 35 N. H. 390.

<sup>3</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

<sup>4</sup> *Deming v. Grand Trunk R. Co.* 48 N. H. 455, 2 Am. Rep. 267.

<sup>5</sup> *Weston v. Grand Trunk R. Co.* 54 Me. 376, 92 Am. Dec. 552; *Peet v. Chicago & N. W. R. Co.* 20 Wis. 594, 97 Am. Dec. 446; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Faulkner v. South Pacific R. Co.* 51 Mo. 311; *Cutting v. Grand Trunk R. Co.* 13 Allen, 381; *Ward v. New York Cent. R. Co.* 47 N. Y. 29, 7 Am. Rep. 405; *Sisson v. Cleveland & T. R. Co.* 14 Mich. 489, 90 Am. Dec. 252.

<sup>6</sup> *Briggs v. New York Cent. R. Co.* 28 Barb. 515.

of years, and is used only for the time of gathering.<sup>1</sup> Where, out of thirty-three bales of cotton, nineteen were lost, the witness was produced to state the average weight of the entire lot and then fix the rate of the nineteen bales by approximation.<sup>2</sup> Where goods are not shipped seeking a market, the same rules of compensation cannot be applied to all cases; but, in estimating damages, the actual consequences of the breach must always be considered. So also, such consequences as the parties are presumed to have contemplated. But damages not the direct and natural consequences of the breach, will not be considered unless the terms of the agreement include them. Loss of profit in business cannot be allowed, unless the data of estimation are so definite and certain, that they can be fixed reasonably by calculation; and then only when the party in fault must have had notice—either from the nature of the contract itself, or otherwise—that such damages would ensue from non-performance. Purely speculative profits cannot be taken into account. Where machinery is transported, the rule permits its rental price and expenses of idle hands to be taken into the estimate.<sup>3</sup>

For the failure of a carrier to deliver machinery in a reasonable time, the damages are measured by the value of the use of the machinery during the period of improper detention.<sup>4</sup> But, where only a portion of the machinery was forwarded in due time, and that portion detained by the negligence of the carrier prevented the use of the whole, it was held that the measure of damages was not what might have been made of the machinery while it was idle, but the legal interest on the capital invested, the expense of the employment of hands necessarily idle during that time, the actual cost of the sending for the missing machinery, and such other damages as resulted necessarily from the carrier's negligence.<sup>5</sup> But, where the machinery was consigned to the agent of the railroad company, to be forwarded, it was held that the de-

<sup>1</sup> *The Umbria*, 46 Fed. Rep. 927.

<sup>2</sup> *Smith v. North Carolina R. Co.* 68 N. C. 107.

<sup>3</sup> *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458.

<sup>4</sup> *Priestley v. Northern I. & C. R. Co.* 26 Ill. 205.

<sup>5</sup> *Foard v. Atlantic & N. C. R. Co.* 53 N. C. 235, 58 Am. Dec. 277.

fendant was not liable as a common carrier for its negligent detention, but only as bailee.<sup>1</sup> Where the carrier failed to deliver, within the proper time, a boiler constructed for a steam saw mill, the recovery should be for the actual expenses incurred, as well as for a reasonable amount of time and trouble in traveling to ascertain what had become of the boiler—if this was necessary,—of the expense incurred for preparations for connecting the boiler with the fixtures and machinery of the saw mill, and interest on the value of the property during the time of detention.<sup>2</sup>

Where large sums of money have been expended in the manufacture of a plant, under an agreement with the railroad company to furnish transportation for a fixed amount per week, in an action for the violation of the contract, the damages are not necessarily the difference between the expenses with interest, less the receipts and value of the property deducted therefrom,—because the plaintiff may have made unusually large investments unnecessarily.<sup>3</sup>

### § 152. *Limitation of Right of Action.*

This subject has been already treated in § 70 *a* and *b* in the matter of the shipments of livestock where the restriction most frequently occurs and the rules there stated apply equally to all other classes of consignments. In addition to what is there said it may be here added that the court should be well satisfied before holding void as being unreasonable, clauses of a bill of lading in printed form and apparently in common use, limiting the time for suit for loss or damage, where no suggestion is made that they are not in such use or that there has been any public or private complaint touching them. A limitation of the time of suit for loss or damage to goods transported, contained in a bill of lading, is not invalid on the mere ground that it contravenes the statute of limitations.

A provision of a bill of lading for the shipment of goods from

<sup>1</sup> *Foard v. Atlantic & N. C. R. Co.* 53 N. C. 235, 58 Am. Dec. 277.

<sup>2</sup> *Davis v. Cincinnati, H. & D. R. Co.* 1 Disney (Ohio) 23.

<sup>3</sup> *Harrison v. New Orleans, J. & G. N. R. Co.* 28 La. Ann. 777.

Chicago to Boston, with the right to hold at Ogdensburg for orders, that any company or carrier concerned in the transportation shall not be responsible as a common carrier for the grain while at any station awaiting delivery, but as warehouseman only, and that they shall not be liable in any case or event unless written claim for the loss or damage shall be made within thirty days, and the action to enforce such claim be brought within three months after such loss or damage occurs,—is unreasonable and void as to the time within which claim is required to be made.<sup>1</sup>

§ 153. *Claim of Limit of Liability under Revised Statutes of the United States. See Section 88.*  
*“Negligence of Imposed Duties—Passenger Carriers.”*

Some new and important provisions have been introduced into the law of carriers by water, by the Act of 3d of March, 1851, entitled “An Act to Limit the Liability of Ship Owners.” Owners of ships under that Act, are not held for loss or damage to the cargo by reason of fire happening to or on board the vessel, unless the fire was caused by the design or neglect of such owner, except in cases where there is a special contract between the owner and the shipper, whereby the former assumes that risk. They are declared not liable as carriers for precious metals, precious stones, or jewels, or for the bills of any bank or public body, unless at the time of their lading a note in writing of their true character and value be given to the owner or his agent, and the same be entered on the bill of lading; and in no case, where that applies, will the owner be liable for the articles therein enumerated beyond the amount so notified and entered. It contains other provisions also of very great importance, and among the number, the following: that for embezzlement, loss, damage or injury by collision, or for any act, matter or thing, loss, damage, or forfeiture done, occasioned or incurred, without the privity or knowledge of the owner, his liability shall in no case exceed the amount or value of his interest in the vessel and the

<sup>1</sup> *Central Vermont R. Co. v. Soper*, 59 Fed. Rep. 879.

freight then pending. No part of the Act, however, applies to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatever used in rivers or inland navigation.<sup>1</sup>

A carrier by ship may extend his statutory exemption from fire, under U. S. Rev. Stat. § 4282, to such loss by fire as occurs after the discharge of the cargo, by special stipulation to that effect in the bill of lading.<sup>2</sup> A steamship company released from liability as a carrier, under the provisions of U. S. Rev. Stat. § 4281, that a carrier shall not be liable "in any form or manner" for certain goods specified, shipped as freight or baggage, without notice of its character and value and the entry of the same upon the bill of lading, is nevertheless still liable for such goods as bailee for hire.<sup>3</sup> The sixth section of the Act is for such remedy to which any party may be entitled against the master, officers or mariners of such vessel for negligence, fraud or other malversation. Any special contract sought to be founded on usage, will not take the case out of the Act.<sup>4</sup>

Owners of vessels are not liable for damages from collision occasioned without their knowledge, beyond the amount of their interest in the ship and her freight.<sup>5</sup> A vessel injured by a collision has no lien on the cargo of the other vessel. In cases of collision, the cargo cannot be appropriated to help equalize the loss between the two vessels, although it may belong to the owner of one of them. If the owner is his own freighter, he must abandon the amount of the freight which he would have paid upon another vessel, according to the price current, but he is not liable if the abandoned cargo belonged to himself.<sup>6</sup> Limited liability under Rev. Stat. §§ 4282, 4287, may be claimed; first, merely by way of defense to an action; or second, surrendering

<sup>1</sup> *The Niagara v. Cordes*, 62 U. S. 7, 16 L. ed. 41.

<sup>2</sup> *Constable v. National SS. Co.* 154 U. S. 51, 38 L. ed. 903.

<sup>3</sup> *Wheeler v. Oceanic Steam Nav. Co.* 125 N. Y. 155.

<sup>4</sup> *Providence & N. Y. SS. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038.

<sup>5</sup> *The Cayuga v. Hoboken Land & Imp. Co.* 81 U. S. 14 Wall. 270, 20 L. ed. 828; *The Baltimore v. Rowland* ("The Baltimore") 75 U. S. 8 Wall. 377, 19 L. ed. 463; *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104, 20 L. ed. 585.

<sup>6</sup> *The Bristol*, 29 Fed. Rep. 867.

the ship or paying her value into court. The latter method is only necessary when the ship owner desires to bring all the creditors claiming damages into concourse for distribution.<sup>1</sup> Ship owners may avail themselves of the defense of limited liability responsibility by answer or plea, if they comply with the statute. The decree made may be limited, they to pay into court the limited sum for which they are liable, and distributing said amount *pro rata* among the parties claiming damages.<sup>2</sup>

The owner of a vessel may institute proceedings to obtain the benefit of the limit of liability provided for by Rev. Stat. §§ 4284, 4285, without waiting for a suit to be begun against him or his vessel, for the loss out of which the liability arises.<sup>3</sup> This liability of ship owners may be discharged by their surrendering and assigning to a trustee the vessel and freight for the benefit of the parties injured, in pursuance of section 4 of the Act, although these may have been diminished in value by the collision, or other casualty during the voyage, and it seems that if they are totally lost, the owners will be entirely discharged.<sup>4</sup> A petition in a district court under the 54th Rule in demurrage, claiming the benefit of limitation of liability provided for in Rev. Stat. § 4283, may be filed after the trial of a cause of collision, upon its merits, and a final decree therein, entered. But the question of fault or general liability, although open to contest in proceedings to obtain limitation of liability, cannot be contested if it has already been decided in such former suit. The provisions for limitation of liability are ineffectual as to any specific contract, if not undertaken till after such party has obtained satisfaction on his demand. Motion to claim the limitation as to one party, does not preclude claiming it against another.<sup>5</sup>

<sup>1</sup> *Thommessen v. Whitwell* ("The Great Western") 118 U. S. 520, 30 L. ed. 156; *National Steam Nav. Co. v. Dyer* ("The Scotland") 105 U. S. 24, 26 L. ed. 1001.

<sup>2</sup> *National Steam Nav. Co. v. Dyer* ("The Scotland") *supra*.

<sup>3</sup> *Ex parte Slayton*, 105 U. S. 451, 26 L. ed. 1066.

<sup>4</sup> *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104, 20 L. ed. 584.

<sup>5</sup> *New York & W. SS. Co. v. Mount* ("The Benefactor") 103 U. S. 239, 26 L. ed. 351.

The right of the owner of a vessel under Rev. Stat. §§ 4282, 4287, to proceed for a limitation of liability is not lost or waived by a surrender of the ship to underwriters. In such case, although the application for the limitation of liability under Rev. Stat. §§ 4282, 4287, has been jointly overruled by the district court and an interlocutory decree has been rendered in favor of the libellants for their entire damages, with reference for proofs, and a report by the master, yet the court, after the decision of the Supreme Court in *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104, 20 L. ed. 585, relating to the same collision and the promulgation of additional rules adopted by that court, received a new petition and ordered a new appraisement to ascertain the value of the ship whilst lying sunk, and made a decree limiting the liability of the owner to the value at that time, and it was decided that the district court had a right to receive such new petition, and to take such proceedings.<sup>1</sup>

Proceedings of the district court under United States Supreme Court Admiralty Rule 54, and U. S. Rev. Stat. §§ 4283-4285 (Act of Congress of June 26, 1884) and U. S. Rev. Stat. § 4289, as amended by Act of June 19, 1886, to limit the liability of shipowners for loss or damage to persons or goods, supersede all other actions and suits for the same damages in the state or national courts, upon the matters being properly presented therein.<sup>2</sup> But an injunction will not be granted to stay proceedings in an action in a district court, to recover for a collision, during the pendency of an appeal in a suit brought by the owners of a vessel to obtain the benefit of a limitation of liability provided for by the Revised Statutes simply because of the expense that will be consequent upon the trials pending the appeal after two judgments below denying the relief asked for in such suit. In a suit by the owners of a vessel to obtain the benefit of the Act of Congress, limiting the liability of vessel owners, the value of the matter in dispute, is the value of the amount of all the claims

<sup>1</sup> *Place v. Norwich & N. Y. Transp. Co.* ("The City of Norwich") 118 U. S. 468, 30 L. ed. 134.

<sup>2</sup> *Black v. Southern P. R. Co.* 39 Fed. Rep. 565; *Providence & N. Y. SS. Co. v. Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038.



against the owners, and if such amount is over five thousand dollars, the supreme court has jurisdiction in an appeal, although the value of the vessel is less than five thousand dollars.<sup>1</sup>

The appraisalment of the value of a ship made at the time she was libeled, is sufficient for the purposes of a proceeding to obtain limitation of liability. Our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury had occurred.<sup>2</sup> The owners of a steamship who comply with the requirements of the English Merchant Shipping Act 1867, § 9, authorizing in proceedings to limit liability a deduction from the registered tonnage of every place in any ship occupied by seamen or apprentices and appropriated to their use, are entitled to deduct from the total gross tonnage as registered the space occupied by the crew.<sup>3</sup>

#### § 154. *When the United States Courts Have Jurisdiction.*

It is now firmly settled that when a corporation created by the laws of one state voluntarily comes, by its officers or agents, within the jurisdiction of another state, and there engages in business, it becomes amenable to the process of the courts of the latter state, if the laws thereof make provision to that effect. In one of the cases,<sup>4</sup> it was declared by the court of appeals of Virginia that the corporation, for the purpose of being sued, is to be considered as having a domicile in the state where it has thus voluntarily located: and in the case of *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 145, 147, 28 L. ed. 379, 381, 382, the Supreme Court of the United States did distinctly hold that a company incorporated in one state, by doing business and having an agent upon whom service may be made in another state, may there acquire another domicile, so as to give locality there to a

<sup>1</sup> *Parcher v. Cuddy* ("The Mamie") 105 U. S. 773, 26 L. ed. 937.

<sup>2</sup> *New York & W. SS. Co. v. Mount* ("The Benefactor") 103 U. S. 239, 26 L. ed. 351.

<sup>3</sup> *The Petrel* [1893] L. R. 3 Prob. Div. 320.

<sup>4</sup> *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. 630.

debt on a policy of insurance as the foundation of administration in the latter state. Where the defendant corporation is suable in the courts of a state, and that such service would be a good service in the courts of the state,<sup>1</sup> what good reason, is there for exempting the company from suit in a Federal court sitting in the same state? Can it be supposed that such was the intention of Congress? Under previous laws a person was suable in any district in which he might be found. Although he might have been a mere sojourner in, or was simply passing through, the district, he was liable to be served therein with process from a Federal court. This was the mischief which Congress intended to remedy by omitting from the Act of 1887 the words "or in which he shall be found." But, clearly, under the provisions of the Act of 1887, if a citizen of a state, without changing, or intending to change, his citizenship, becomes an inhabitant of another state, or, in other words, has his domicile or fixed residence therein, he is suable in the latter state by original process from a Federal court.<sup>2</sup> Certainly it was not the intention of the Act to make any distinction in respect to liability to suit between natural persons and corporations. As a corporation is a "person" within the meaning of the Act, so, also, may it be an "inhabitant."<sup>3</sup>

In a suit by a railroad company for injunction to restrain a shipper from prosecuting in a state court a multiplicity of suits for overcharge in freight, the maintenance of the scheduled rate under which the charges were made is the real subject of dispute, and the value of such maintenance determines the jurisdictional amount of the controversy. Where such value is not liquidated or fixed by law, the alleged value is conclusive on demurrer to the bill. A Federal court is not prohibited by Rev. Stat. § 720, from issuing an injunction to restrain the prosecution

<sup>1</sup> *Hagerman v. Empire State Co.* 97 Pa. 534; Act March 21, 1849 (Purd. Dig. 355).

<sup>2</sup> *Parker v. Overman*, 59 U. S. 18 How. 137, 15 L. ed. 318.

<sup>3</sup> This conclusion is at variance with that in *Filli v. Delaware, L. & W. R. Co.* 37 Fed. Rep. 65, but in accord with the decision in *Zambrino v. Galveston, H. & S. A. R. Co.* 38 Fed. Rep. 449, and authorities there cited. *Riddle v. New York, L. E. & W. R. Co.* 3 Inters. Com. Rep. 230, 39 Fed. Rep. 230.

in a state court of a multiplicity of threatened suits which have not been actually begun.<sup>1</sup>

The jurisdiction of admiralty extends to all cases of tort committed on the high seas, and in navigable waters in this country.<sup>2</sup> The jurisdiction of courts of admiralty in matters of contract depends upon the nature of the contract, but in torts and collisions it depends entirely on the locality.<sup>3</sup> Ordinarily, resort is had to the rules of common law to determine what acts are marine torts.<sup>4</sup> Where damage arises from two vessels meeting on the sea called technically a collision, courts of admiralty have a general jurisdiction.<sup>5</sup>

A tort is deemed marine when the injury is sustained by a vessel afloat, although the negligence which caused it was failure to perform a duty upon land.<sup>6</sup> In cases of tort locality is the test of jurisdiction to the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on the water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury.<sup>7</sup> Within this settled principle a tort is maritime, and within the jurisdiction of the admiralty, when the injury is to a vessel afloat, although the negligence causing the injury originated on land.<sup>8</sup>

<sup>1</sup> *Texas & P. R. Co. v. Kutenan*, 54 Fed. Rep. 547.

<sup>2</sup> *Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace Steam Tow Boat Co.* 64 U. S. 23 How. 209, 16 L. ed. 433; *Leathers v. Blessing*, 105 U. S. 626, 26 L. ed. 1192; *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge Co.* 73 U. S. 6 Wall. 213, 18 L. ed. 753; *Jackson v. The Magnolia*, 61 U. S. 20 How. 296, 15 L. ed. 909.

<sup>3</sup> *Waring v. Clarke*, 46 U. S. 5 How. 441, 12 L. ed. 226; *Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace Steam Tow Boat Co.* *supra*; *Commercial Transp. Co. v. Fitzhugh*, 66 U. S. 1 Black, 574, 17 L. ed. 107.

<sup>4</sup> *Peterson v. Watson*, Blatchf. & H. 487.

<sup>5</sup> *The Dundee*, 1 Hagg. Adm. 109; *Clay v. Willis*, 1 Barn. & C. 156; *The Public Opinion*, 2 Hagg. Adm. 398; *The Thames*, 5 C. Rep. Adm. 308.

<sup>6</sup> *Leonard v. Decker*, 22 Fed. Rep. 741.

<sup>7</sup> *Hough v. Western Transp. Co.* ("The Plymouth") 70 U. S. 3 Wall. 20, 18 L. ed. 125; *Ex parte Phenix Ins. Co. of Brooklyn*, 118 U. S. 610, 30 L. ed. 274.

<sup>8</sup> *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge* ("The Rock Island Bridge") 73 U. S. 6 Wall. 213, 18 L. ed. 753; *Leonard v. Decker*, 22 Fed. Rep. 741.

In the former case it was ruled that an action *in personam* would lie against the owners of the bridge, because the injury was consummate upon navigable waters, being inflicted upon a movable thing engaged in navigation: but that a proceeding *in rem* against the bridge was not maintainable, because a maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. And so an injury happening through default of the master to one upon a vessel discharging cargo at a wharf to which she was securely moored, is within the admiralty jurisdiction,<sup>1</sup> but otherwise, if the injury occurred to one upon the wharf.<sup>2</sup> In the latter case there is an inadvertent remark to the effect that both the wrong and the injury must occur upon the water—a proposition not sustained by authority. It suffices if the damage—the substantial cause of action arising out of the wrong—is complete upon navigable waters.<sup>3</sup> It has been insisted that where an injury happened in the midst of, or in space above, the water, it must be held to have occurred upon the water, and a bridge must be held to be personal property on navigable waters.

But this contention cannot be upheld. In legal signification land includes not only the surface of the earth, but all under it or over it. It is otherwise with respect to the sea. A suspension bridge is not upon the water, because sustained in space above the water. Nor in any juster sense is a bridge upon the water, because supported upon masonry resting upon the bed of a river. Bridges are only prolongations over waters of highways upon land. They are not afloat. Like wharves and piers, they are connected with the shore. Unlike wharves and piers, they are obstructions, not aids, to navigation. They concern commerce upon land, not upon the sea. Within the intendment of the maritime law they are—equally with wharves and piers—structures upon or connected with the shore. They pertain to the land not to the sea; and so are without the cognizance of the admiralty jurisdiction. An injury thereto cannot be said to have occurred upon water,

<sup>1</sup> *Leathers v. Blessing*, 105 U. S. 626, 26 L. ed. 1192.

<sup>2</sup> *The Mary Stewart*, 10 Fed. Rep. 137.

<sup>3</sup> *Hough v. Western Transp. Co.* ("The Plymouth") 70 U. S. 3 Wall. 20, 18 L. ed. 125.

where the cause of the injury is a movable thing navigating the waters; but the consummation of the wrong is upon an immovable structure above the waters, attached to the land, and not afloat. The absence of admiralty jurisdiction over injuries to such structures is sustained by an overwhelming weight of authority.<sup>1</sup> To deny jurisdiction for injuries to such structures by vessels, while asserting it with respect to injuries to vessels by such structures,<sup>2</sup> may seem a narrow construction of the admiralty jurisdiction. It is likened to the refusal of the admiralty at one time to assert jurisdiction of contracts of maritime insurance made on land and to be performed on land, but touching the perils of the sea, now held to be within the jurisdiction of the admiralty,<sup>3</sup> or of contracts of affreightment, made on land, but to be performed upon water, now of undoubted admiralty jurisdiction.<sup>4</sup> The distinction grows out of the peculiar and restricted nature of the admiralty jurisdiction as touching things "pertaining to the sea."

In *The Arkansas*, 17 Fed. Rep. 383, 386, it is asserted that an injury to a bridge would be a marine tort, and that a proceeding *in rem* would lie against a boat causing the injury. No authority is cited in support. The remark itself is *obiter dictum*; and although in *Cartier v. Flint & P. M.* No. 2, 33 Fed. Rep. 511, 515, there is another *obiter* indorsing the *dictum* in *The Arkan-*

<sup>1</sup> NOTE.—As to a bridge: *The Neil Cochran*, 1 Brown, Adm. 162; *The Savannah* (U. S. D. C. Pa.) Cadwallader, J., not reported, but referred to in 1 Parsons, Shipp. & Adm. 532. As to a wharf: *Hough v. Western Transp. Co.* ("The Plymouth") 70 U. S. 3 Wall. 20, 18 L. ed. 125; *The Ottawa*, 1 Brown, Adm. 356; *The C. Accame*, 20 Fed. Rep. 642. As to a derrick resting on the soil at the bottom, and in the midst of the water: *The Maud Webster*, 8 Ben. 547. As to a marine railway: *The Professor Morse*, 23 Fed. Rep. 803. As to a boom of logs, anchored or fastened to the shore: *The "City of Erie" v. Cunfield*, 27 Mich. 479. The latter is perhaps an extreme case, and seems opposed upon principle to the case of *The Ceres*, 7 W. N. C. 576, to the effect that the admiralty has jurisdiction of an injury by a tug boat to a dry dock floating on a navigable river and moored to a wharf.

<sup>2</sup> *Galena, D. D. & M. Packet Co. v. Rock Island R. Bridge* ("The Rock Island Bridge") 73 U. S. 6 Wall. 213, 18 L. ed. 753; *Etheridge v. Philadelphia*, 26 Fed. Rep. 43; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619.

<sup>3</sup> *New England M. Ins. Co. v. Dunham*, 78 U. S. 11 Wall. 1, 20 L. ed. 90.

<sup>4</sup> *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Morewood v. Enequist*, 64 U. S. 23 How. 493, 16 L. ed. 516.

sas, both are contrary to the authority of *Hough v. Western Transp. Co.* ("The Plymouth") 70 U. S. 3 Wall. 20, 18 L. ed. 125. If it be expedient to clothe the admiralty with jurisdiction of all torts committed by vessels, whether the resulting damage occur upon land or water, as now it has jurisdiction over damage to vessels whether the wrongful act causing damage originate on land or water, the object must be promoted—as it has come to pass in England—through the legislative, not the judicial, power. Courts *sit dicere et non dare legem*. Settled principles of jurisdiction may not be changed to meet individual notions of right. Nor can the jurisdiction be aided by the statute of the state creating a lien for all injuries done by vessels to persons or property. A state statute cannot confer jurisdiction upon courts of admiralty. It is only when the subject is maritime, and so within the jurisdiction of the admiralty, that a lien granted by local law will be recognized.<sup>1</sup>

Locality is the leading test of jurisdiction in torts. And where a vessel took fire at a wharf, alleged to be from the negligence of the officers, and the fire spread and consumed certain storehouses on the wharf, it was held not to be a case for admiralty proceedings, because the injury complained of occurred on the land and not on the water.<sup>2</sup> To be within the admiralty jurisdiction it is not sufficient that the wrong originated on the high seas or on navigable waters;<sup>3</sup> but that the act was consummated upon such waters.<sup>4</sup> So the admiralty jurisdiction of United States courts does not extend to seizures made upon land.<sup>5</sup> Admiralty has jurisdiction over damages done to a vessel in navigable water by a bridge or permanent structure. The test of jurisdiction is the

<sup>1</sup> *The Curtis, The Camden and The Welcome, The City of Milwaukee, Libellant*, 3 L. R. A. 711, 37 Fed. Rep. 705.

<sup>2</sup> *Hough v. Western Transp. Co.* ("The Plymouth") 70 U. S. 3 Wall. 33, 18 L. ed. 127; Wells, Jur. of Courts, 275.

<sup>3</sup> *Thomas v. Lane*, 2 Sumn. 9; *Steele v. Thacher*, 1 Ware, 93; *Commercial Transp. Co. v. Fitzhugh*, 66 U. S. 1 Black, 579, 17 L. ed. 109.

<sup>4</sup> *United States v. Magill*, 1 Wash. C. C. 463; *United States v. Davis*, 2 Sumn. 482; 2 Hale, P. C. 17; 1 Hawk. P. C. chap. 37, § 17.

<sup>5</sup> *United States v. Winchester*, 99 U. S. 372, 25 L. ed. 479. See, as to admiralty jurisdiction generally, *Allen v. Newberry*, 62 U. S. 21 How. 244, 16 L. ed. 110.

locality of the thing injured, and not of the thing inflicting the injury.<sup>1</sup>

Neglect to repair a wharf in consequence of which the merchandise breaks through and is injured, may constitute a tort of which admiralty has jurisdiction.<sup>2</sup> The petition or libel in a suit for loss or damage to persons or goods may be filed in the district court before, as well as after, suit commenced to recover damages. Jurisdiction of the district court, when once acquired, of an action for loss or damages to persons or goods, is exclusive; and it is the duty of all other courts to suspend proceedings, dismiss the suit, and refer the whole matter to the district court.<sup>3</sup> The joinder of causes of suit not enumerated in Admiralty Rules 12 to 20 inclusive are not governed thereby, but by Rule 46; and where the facts in a case establish a liability against the master and a lien on the ship for the same claim, such liability and lien may be enforced in one libel.<sup>4</sup> In admiralty cases where the libel contains only a general charge of negligence, and the parties go to trial without any other specification, assent to proof of any kind of negligence may be inferred.<sup>5</sup> The courts of the United States in the absence of legislation upon the subject by Congress, recognize the statutes of limitation of the several states, and give them the same construction and effect which are given by the local tribunals. If the highest judicial tribunal of a state adopt new views as to the proper construction of a statute of the state and reverse its former decisions, the Supreme Court of the United States courts will follow the latest settled adjudications.<sup>6</sup>

A legal or equitable right under state laws may be prosecuted before state courts, and, when the parties reside in different states, before federal courts, subject to this qualification, that, when a right arises under a law of the United States, Congress may give federal courts exclusive jurisdiction. If an Act of Congress gives

<sup>1</sup> *Boston v. Crowley*, 38 Fed. Rep. 202.

<sup>2</sup> *The City of Lincoln*, 25 Fed. Rep. 835.

<sup>3</sup> *Black v. Southern Pac. R. Co.* 39 Fed. Rep. 565.

<sup>4</sup> *The City of Carlisle*, 5 L. R. A. 52, 39 Fed. Rep. 807.

<sup>5</sup> *The Thomas Melville*, 31 Fed. Rep. 486.

<sup>6</sup> *Bauserman v. Blunt*, 147 U. S. 617, 37 L. ed. 316

a penalty to a party aggrieved, without specifying a remedy therefor, it may be enforced in a state court; but if a right is conferred by statute, or a specific remedy is provided, or a new power and means of execution are granted, the right can be enforced only in the mode prescribed by the Act. A party who seeks damages, alleged to have been sustained in consequence of the violation by a common carrier of the Interstate Commerce Law, as the Act provides for redress by procedure either before the Commission, or by suit before the Federal court, cannot bring suit before the state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the Commission or the Federal court; otherwise the party would have a third alternative or mode of redress, not contemplated by the Act by which he is restricted to one of two remedies.<sup>1</sup>

A suit against the railroad commissioners of a state and the attorney general, to restrain the former from enforcing the rates established by them on the railroads in the state, and to restrain the latter from instituting any suits to recover penalties for failing to conform to such rules, is not a suit against the state. Whenever a citizen of a state can go into the courts of the state, to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the Federal courts to maintain a like defense. A state has general power to regulate the fares and freights which may be charged and received by railroad or other carriers, and this regulation can be carried on by means of a commission. No legislation of a state, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. One section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. The courts have the power and it is their duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as so work a practical destruction to rights of property, and if found so to be, to restrain its operation. It is within the scope of judicial power and a part of judicial duty to

<sup>1</sup> *Copp v. Louisville & N. R. Co.* 3 Inters. Com. Rep. 625, 12 L. R. A. 725, 43 La. Ann. 511.



restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another, or of the public. It was within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another state, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. The tariff rates prescribed by the railroad commissioners of Texas on the International & Great Northern Railroad were, from the facts admitted by the demurrer, unjust and unreasonable, and the decree in the case was reversed so far as it restrains them from establishing reasonable rates, and affirmed so far as it restrains the enforcement of the rates already established by them.<sup>1</sup>

§ 155. *Proceedings against Violators of the Interstate Commerce Act.*

The provisions of the 8th, 9th, 13th, 14th and 15th sections of the Act to Regulate Commerce seem clearly to indicate the intention of Congress that the Commission should investigate and report upon the question of reparation to complainants for damage sustained by the carrier's illegal conduct in the past, as well as upon the mere naked question of a violation of the law. But an attentive consideration of the 16th section as it originally stood, and which was intended to provide machinery for enforcing the orders of the Commission shows that no provision was made for enforcing its orders in the matter of reparation for past damages. This conclusion results from the fact that proceedings to enforce the Commission's orders were by the terms of the section confined

<sup>1</sup> *Reagan v. Farmers Loan & T. Co.* 4 Inters. Com. Rep. 560, 578, 154 U. S. 362, 420, 38 L. ed. 1014, 1031.

to the equity side of the court, and contemplated the use of injunctive process alone; whereas, if the confirmation of the Commission's award of past damages had been the object in view, provision would doubtless have been made for proceedings on the law side of the court, and for an ordinary judgment and execution as in actions at law. Besides this it seems clear that where in any case the sole question involved is one of reparation for past damages, a constitutional right to jury trial exists, and the 16th section failed to provide for jury trial in any case whatever.

Considerations of this character were adverted to by the Commission in its First Annual Report in the following language: "In none of the cases so far decided by the Commission has it felt called upon to order reparation to be made for past injury. Most of the cases were such as to present no case for reparation—they looked only to the establishment of a rule for the future. Some complaints, however, were evidently made in the expectation that the Commission might proceed to give damages upon a grievance that would support an action on the common law side of the Federal court. The Commission, when such complaints have been brought to a hearing, has not discovered in the statute a purpose to confer upon it the general power to award damages in the cases of which it may take cognizance. The failure to provide in terms for a judgment and execution is strong negative testimony against such a purpose; but what is perhaps more conclusive is that the Act must be so construed as to harmonize with the 7th Amendment to the Federal Constitution, which preserves the right of trial by jury in common law suits."

In the case of *Councill v. Western & A. R. Co.* 1 Inters. Com. Rep. 638, decided Dec. 3, 1887, the complainant alleged that he had been subjected to unreasonable prejudice and unjust discrimination, and claimed before the Commission large money damages for injuries done him. The Commission found that he had been subjected to unreasonable prejudice and unjust discrimination as alleged, and ordered the carrier to cease and desist therefrom. But the Commission declined to go into the question of damages to the complainant; saying: "Under the 7th Amendment to the Constitution of the United States, the defendant in any case at

common law is entitled to a jury trial. This claim is in its nature an action of trespass, and therefore presents such a case . . .”

In the case of *Heck v. East Tennessee, V. & G. R. Co.* decided Feb. 15, 1888, 1 Inters. Com. Rep. 775, complainants charged that the defendants unjustly discriminated against them by refusing to haul their coal, and prayed that their rights as shippers of coal might be secured by the order of the Commission, and that large pecuniary damages be awarded them for losses sustained by defendant's refusal to ship their coal. The defendants were ordered by the Commission to receive and forward complainant's coal when offered for transportation, but as stated in the opinion: “The claim for pecuniary damages made by the complainants was not entertained on the hearing because it presents a case at common law in which the defendants are entitled to a jury trial.”

In the case of *Riddle v. New York, L. E. & W. R. Co.* decided Feb. 23, 1888, 1 Inters. Com. Rep. 787, the defendants were adjudged to have violated the Act in refusing to furnish cars for the transportation of complainant's coal; but it was said in the opinion: “The Commission has repeatedly held that it can make no award of damages in a case like the present for the reason that the defendants are entitled to have the amount assessed by a jury.”

By Act of March 2, 1889, the 16th section was so amended as to provide in cases involving the right to jury trial for proceedings to enforce the Commission's orders on the law side of the court, and for a trial and judgment as at common law. The correctness of the position taken by the Commission as above explained was thus recognized by Congress, and the obstacle in the way of the Commission's recommending reparation for past damages to complainants was removed. But this Act expressly provided that it should have no application to proceedings pending before the Commission at the time of its passage.

In the case of *Rawson v. Newport, News & M. V. Co.* decided Nov. 13, 1889, 2 Inters. Com. Rep. 626, the decision was rendered after the amendment of the 16th section above referred to, but the case had been pending at the date of the passage of that amendment. The petition had prayed the Commission to award

him reparation for past damages, but this was refused, the portion of the opinion relating to that question being as follows: "As to the reparation claimed, prior to the amendment of the 16th section of the Act to Regulate Commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than twenty dollars was involved, we could award no reparation in consequence of the provisions of the 7th Amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time. The amendment to this effect is found in the proviso in section 22 of the statute as amended, and is in the following language: "Provided that no pending litigation shall in any way be affected by this Act. The statute, therefore, leaves the petitioner to enforce his claim for reparation in the courts as he may be advised, and accordingly this petition is dismissed without prejudice."

In the most of the complaints brought before the Commission since the amendment of the 16th section, as described above, the question of reparation for past damages has not been involved. In some cases where that question was involved, its determination seemed so peculiarly appropriate for a jury, that the Commission did not consider it; deeming it best for all parties that the question of the amount of damages should be settled by a jury in the regular courts. It has, however, since been held by the Circuit Court of the United States for the Western District of Pennsylvania in the case of *Riddle v. New York, L. E. & W. R. Co.* Feb. 23, 1888, 1 Inters. Com. Rep. 787, that where the question of reparation for past damages has been submitted to the Commission, it cannot be subsequently made the subject of a suit in court, even though the Commission has expressly declined to pass upon it. A like opinion has been intimated by the Circuit Court of the United States for the Southern District of Iowa. Although regulation for alleged violations of some of the provisions of the

first four sections of the Act to Regulate Commerce is the principal and important remedy sought in most complaints, yet reparation in many cases is not an unimportant incident. Therefore, so long as these rulings of the courts last mentioned stand as the law it seems a plain duty to complainants to pass upon the question of reparation for past damages whenever a claim is made therefor. Indeed it seems to rise above mere discretion and becomes an imperative duty; otherwise the dual remedy which Congress seemed to contemplate in a single proceeding would be defeated; and even more, one of the remedies is lost under an application of the somewhat technical doctrine of the election of remedies operating in contravention at least of the spirit of the enactment as well as the demands of justice.<sup>1</sup>

A suit brought by the Interstate Commerce Commission in the United States circuit court to enforce an order of the Commission, is an original and independent proceeding. The court is not confined to a mere re-examination of the case as heard and reported by the Commission; but the court hears and determines the cause *de novo* upon proper pleadings and proof. The Commission's report is *prima facie* evidence of the matters of fact therein reported; but the court will hear all such other, and further testimony as either party may introduce, bearing upon the matters in controversy; and will permit such pleadings as will bring before the court clearly, and in legal form, such matters as may be pertinent and proper in view of the issues raised.<sup>2</sup>

The circuit judge, holding the Circuit Court of the United States for the Northern District of Illinois, handed down his decision in an important question bearing on the powers of the Interstate Commerce Commission. When W. G. Brinson, David Brown, L. Hopkins, Henry Walker, W. R. Steeking, and others refused to answer certain questions asked by the Interstate Com-

<sup>1</sup> *Macloon v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 711.

<sup>2</sup> *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 332, 56 Fed. Rep. 925; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 351, 2 L. R. A. 289, 37 Fed. Rep. 567; *Interstate Commerce Com. v. Lehigh Valley R. Co.* 3 Inters. Com. Rep. 796, 49 Fed. Rep. 177; *Interstate Commerce Com. v. Atchison, T. & S. F. R. Co.* 4 Inters. Com. Rep. 323, 50 Fed. Rep. 295.

merce Commission, District Attorney Milchrist brought a petition before Judge Gresham to compel the production of the books and the answer of the questions. The circuit judge refused to grant the petition, holding that the court could not be made subsidiary to or a subordinate auxiliary to a non-judicial and administrative body. The case was that in which the Chicago & Grand Trunk, the Calumet & Blue Island, Chicago & Kenosha, Joliet & Blue Island, Chicago & Southeastern, Milwaukee, Bayview & Chicago, Baltimore & Ohio, Chicago & Eastern Illinois, Big Four, Chicago & Erie, Michigan Central, Lake Shore, Pennsylvania, Nickel Plate, Wabash, and Lackawanna were accused of unjust discrimination in favor of large Chicago shippers, notably the Illinois Steel Company. This decision, in the language of the Supreme Court of the United States in reviewing and reversing the ruling, "would go far towards defeating the object for which the people of the United States placed commerce among the states under National control." Fortunately so ill advised a decision, promptly discredited by other courts and by the members of the legal profession, was promptly reversed on the appeal taken to the Supreme Court of the United States in the masterly opinion pronounced by Justice Harlan.<sup>1</sup> This opinion is specially important as an exposition of the Interstate Commerce Act.

The appeal brought up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July 1892 by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and amended by the acts of March 2, 1889 and February 10, 1891. 24 Stat. at L. 379, chap. 104; 25 Stat. at L. 855, chap. 382; 26 Stat. at L. 743, chap. 128; 1 Rev. Stat. Supp. 529, 684, 891. The petition was based on the 12th section of the Act authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers. The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not

<sup>1</sup> *Interstate Commerce Com. v. Brimson*, 154 U. S. 447, 38 L. ed. 1047.

judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended.<sup>1</sup> The provisions of the Interstate Commerce Act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of storing of property, wholly within one state and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory. But they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. The term "railroad" as used in the Act includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment of carriage. All charges made for services rendered or to be rendered in the transportation of passengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. § 1.

Any carrier subject to the provision of the Act, directly or indirectly, by special rate, rebate, drawback, or other device,

<sup>1</sup> 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property, than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the Act expressly declares to be unlawful. § 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect. And carriers subject to the provisions of the Act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines; but this regulation does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. § 3.

It is made unlawful for any carrier subject to the provisions of the Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the Commission, the carrier may in special cases, after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which the carrier may be relieved from the operation of this section. § 4.



It is also made unlawful for any carrier subject to the provisions of the Act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance is deemed a separate offense. § 5.

Another section of the Act provides for the printing and posting by carriers of their rates, fares, and charges, for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares, and charges, including the rates established and charged for freight received in this country to be carried through a foreign country to any place in the United States; forbids any advance or reduction in such rates, fares, and charges, so established and published, except upon public notice, of which changes the Commission shall be notified; requires every carrier to file with the Commission copies of all contracts, agreements, or arrangements with other carriers relating to any traffic affected by the provisions of the Act, as well as copies of schedules of joint tariffs of rates, fares, or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time; authorizes in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares, and charges, a writ of mandamus to be issued by any circuit court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offense may be committed, and if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic, and has an agent to perform such service, to compel compliance with the above provisions of the section

relating to schedules of rates, fares, and charges—such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the Act, and the failure to comply with its requirements being punishable as and for a contempt: and empowers the commissioners, as complainants, to apply, in any such circuit court of the United States, for a writ of injunction against the carrier, to restrain it from receiving or transferring property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the 1st section of the Act, until the carrier shall have complied with the provisions last referred to. § 6.

So a common carrier subject to the provisions of the Act is forbidden to enter into any combination, contract or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the Act. § 7.

By the 11th section a Commission is created and established, to be known as the Interstate Commerce Commission, and to be composed of five commissioners, appointed by the President, by and with the advice and consent of the Senate. § 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute; prescribe penalties against carriers for illegal exactions and discriminations; and indicate how the provisions of the statute may be enforced against carriers by the Commission.

The 12th section (26 Stat. at L. 743, chap. 128) the validity of certain parts of which is involved in this proceeding, provides as

follows: "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section. And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such

court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided. Every person deposing as herein provided shall be cautioned and sworn (or affirm if he so request) to testify the whole truth; and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with Commission. All depositions must be promptly

filed with the Commission. Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States." § 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause: Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois, in connection, respectively, with the Baltimore & Ohio Railroad Company, the Baltimore & Ohio Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburg, Fort Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka and Santa Fé Railway Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic or traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago & Northwestern Railway Company; and that said Illi-

nois Steel Company owned and controlled the above named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the Act to Regulate Commerce, and obtaining special, illegal, unjust and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the Commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies, so owned, controlled, and operated, had filed with the Commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges as required by the Act of Congress. The Commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the Commission the above contracts, agreements, and tariffs.

An order was thereupon made by the Commission, which recited the facts of the informal complaint made to it, and required each of the above mentioned companies to make and file in its

office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of and responding to the following questions: 1. Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement. 2. Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carrier? 3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company; and if so, to what amount?

The order further required all of the companies named to appear before the Commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear. Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the Commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet & Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreasonable rates in interstate traffic or in securing to that company illegal, undue, or unreasonable preferences.

The Commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight. Among the witnesses subpoenaed to testify before the Commission was William G. Brinson, the president and manager of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching—switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them; mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the Commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the Commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?" William R. Stirling, the



first vice president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the Steel Company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the Commission issued a *subpoena duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpoena was issued to William R. Stirling, as first vice president of the Steel Company, commanding him to appear before the Commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpoenas, but refused to produce the books or either of them so ordered to be produced. The Commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the Commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the question propounded to them, respectively, were immaterial and irrelevant were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the 12th section of the Act unconstitutional and void, so far as it authorizes or requires the circuit court of the United States

to use their process in aid of inquiries before the Commission? The court says it recognizes the importance of this question, and has bestowed upon it the most careful consideration. As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Art. 3, § 2) and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. at L. 434, chap. 866) the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial body."<sup>1</sup> In other words if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that

<sup>1</sup> *Re Interstate Commerce Commission*, 4 Inters. Com. Rep. 315, 53 Fed. Rep. 476, 480.

body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an Act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case of controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, the court holds, is warranted by that instrument. The Constitution expressly confers upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Art. 1, § 8. While the completely internal commerce of a state is reserved to the state itself, because never surrendered to the general government, commerce, the regulation of which it committed by the Constitution to Congress, comprehends traffic, navigation and every species of commercial intercourse or trade between the United States, among the several states, and with the Indian tribes.<sup>1</sup> "It may be doubted," the court has said, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and

<sup>1</sup> *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 193, 194, 6 L. ed. 23, 69.

justly took, that strong interest which arose from a full conviction of its necessity."<sup>1</sup> "In the matter of interstate commerce," the court, speaking by Mr. Justice Bradley, has declared, "the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems."<sup>2</sup> The same principle was announced by the present Chief Justice in *Stoutenburgh v. Hennick*, 129 U. S. 141, 148, 32 L. ed. 637, 639.

What is the nature of the power thus expressly given to Congress, and to what extent and under what restrictions, may it be constitutionally exerted? This question was answered when Chief Justice Marshall said that it was the power "to prescribe the rule by which commerce is to be governed." "This power," the Chief Justice continued, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments."<sup>3</sup> Congress

<sup>1</sup> *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 446, 6 L. ed. 678, 688; *Philadelphia & S. M. SS. Co. v. Pennsylvania*, 1 Inters. Com. Rep. 308, 122 U. S. 326, 346, 30 L. ed. 1200, 1205.

<sup>2</sup> *Robbins v. Shelby County Taxing Dist.*, 1 Inters. Com. Rep. 45, 120 U. S. 489, 498, 30 L. ed. 694, 696.

<sup>3</sup> *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 189, 196, 197, 6 L. ed. 23, 68, 70.

thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce among the several states is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular Act of Congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the Constitution?

The general principle applicable to this subject was long ago announced by the court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 421, 423, 4 L. ed. 579, 605, it was said: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Again: "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Guided by these principles, the court inquire whether the twelfth section of the Interstate Commerce Act, so far as it authorizes the present proceeding, assumes to invest the circuit courts of the United States with functions that are not judicial. It was not disputed, it is said, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one to another, is a proper regulation of interstate commerce, or that the object Con-

gress has in view by the Act in question may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the Act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the Act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a Commission established for the purpose of enforcing that Act, the court cannot say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principal of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."<sup>1</sup> The test of the power

<sup>1</sup> *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 409, 4 L. ed. 579, 602.

of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions.<sup>1</sup>

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.

It is also observed that independently of any question concerning the nature of the matter under investigation by the Commission—however legitimate or however vital to the public interests the inquiry being conducted by that body—the judgment below rests upon the broad ground that no direct proceeding to compel the attendance of a witness before the Commission, or to require him to answer questions put to him, or to compel the production of books, documents or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which under the Constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial.

<sup>1</sup> *Union Pac. R. Co. v. United States* ("Sinking Fund Cases") 99 U. S. 700, 718, 25 L. ed. 496, 501.

And the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although by the established doctrine of the courts a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because and only because its road is a public highway established primarily for the convenience of the people and to subserve public objects, and therefore, subject to governmental control.<sup>1</sup>

What is a case or controversy to which, under the Constitution, the judicial power of the United States extends? Referring to the clause of that instrument, which extends the judicial power of the United States to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made or that shall be made under their authority, the court, speaking by Chief Justice Marshall, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States."<sup>2</sup> Mr. Justice Curtis, after observing that Congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty, nor on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States,

<sup>1</sup> *Cherokee Nation v. Southern Kansas R. Co.* 135 U. S. 641, 657, 34 L. ed. 295, 302.

<sup>2</sup> *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 819, 6 L. ed. 204, 223. And in *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 284, 15 L. ed. 372, 377.



as it may deem proper." So, in *Smith v. Adams*, 130 U. S. 173, 32 L. ed. 897, Mr. Justice Field, speaking for the court, said that the terms "cases" and "controversies" in the Constitution embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs." Testing the present proceeding by these principles, the result is reached that it is one that can properly be brought under judicial cognizance.

Among the statutes is an Act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally entrusted to an administrative body for investigation—is, it is said, not disputed and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon any one, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States,

seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an Act of Congress and seek to obstruct its enforcement. And those issues made in the form prescribed by the Act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an Act of Congress declaring it to be an offense against the United States for any one to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form, and direct in its

operation, for the prompt and conclusive determination of this dispute.

As the circuit court is competent under the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination or distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, the court say, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for non-compliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the states is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties, the supreme court cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the Act of Congress is clear and strong.<sup>1</sup> In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

The court does not overlook constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be in-

<sup>1</sup> *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 128, 3 L. ed. 162, 175.

vested with, a general power of making inquiry into the private affairs of the citizen.<sup>1</sup> As said in *Boyd v. United States*, 116 U. S. 616, 639, 29 L. ed. 746, 751—and it cannot be too often repeated—all the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in *Re Pacific R. Commission*, 32 Fed. Rep. 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. The court had already spoken fully upon that general subject in *Counselman v. Hitchcock*, 3 Inters. Com. Rep. 816, 142 U. S. 547, 35 L. ed. 1110. It need not add anything to what has been there said. It is enough in the view of the court that as the Interstate Commerce Commission, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the

<sup>1</sup> *Kilbourn v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386.

petition of the Commission could have been dismissed upon its merits.

Attention was called also to the fact that after the decision in *Counselman v. Hitchcock*, the Interstate Commerce Act was amended by an Act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the Act of Congress, entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. at L. 443, chap. 83. But the Act was not in force when this case was determined below. Nor does it reach the question whether a proceeding like the present one can be maintained in a circuit court of the United States.

In the course of the argument at the bar some attention was

called to *Hayburn's Case*, 2 U. S. 2 Dall. 409, 1 L. ed. 436, and *United States v. Ferreira*, 54 U. S. 13 How. 40, 46, 14 L. ed. 42, 44, as announcing principles not in harmony with the views the court expressed in this opinion. Hayburn's case was an application for a mandamus, it was explained, to the Circuit Court of the United States for the District of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension list of the United States in conformity with an Act of Congress, approved March 23, 1792, chap. 11, which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims to invalid pensions. The court took the case under advisement, but as Congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's case, we are informed of the views expressed at the circuit by members of the supreme court in relation to the Act of 1792. They concurred in holding that it was not in the power of Congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned to the circuit courts were not of that description, and were not contemplated by the Act of Congress as of that character; and, consequently, that the Act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by Chief Justice Taney, under the direction of the court, and found in 54 U. S. 13 How. 52, 14 L. ed. 47, an account is given of *United States v. Todd*, which also involves the validity of the Act of 1792, so far as it imposed upon the circuit courts duties relating to pensions. And it is there stated that Chief Justice Jay and Justice Cushing, upon further reflection, became satisfied that the power conferred by the Act of 1792 on the circuit court as a court could not be construed as giving such power to the judges of the court as commissioners. The same general principles were announced in Ferreira's case, which arose under the treaty of 1819 between Spain and the United

States, and under certain acts of Congress passed to carry a particular article of that treaty into execution. The case came before the court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want of jurisdiction in the court raised the question whether the district judge exercised judicial power, strictly speaking, under the Constitution. The motion to dismiss was sustained. Chief Justice Taney, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the Act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission."

It thus appears that the Act of 1792, above referred to, at-

tempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of Congress involved in Ferreira's case conferred no authority upon the district judge to determine finally any questions of a judicial nature, and, without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding, or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the Secretary of the Treasury.

An allusion was also made in this connection to *Gordon v. United States*, 117 U. S. appx. p. 697 and *Re Sanborn*, 148 U. S. 222, 37 L. ed. 429. In Gordon's case, the question was whether the court had jurisdiction to review the action of the Court of Claims in respect to a claim examined and allowed in the latter court under an Act of Congress (12 Stat. at L. 65, chap. 92, §§ 5, 7, 14) which, among other things, provided that no money should be paid out of the Treasury for any claim passed upon by the Court of Claims, until after an appropriation therefor should be estimated by the Secretary of the Treasury, and an appropriation to pay it be made by Congress. Under that Act neither the Court of Claims nor supreme court could do anything more than certify their opinion to the Secretary of the Treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims, and if he decided in favor of the claimant, it rested with Congress to determine whether it would or would not make an appropriation for its payment. Neither the Court of Claims nor Supreme Court could, by process, enforce its judgment; and whether the claim was paid or not, did not depend on the decision of either court, but upon the future action of the Secretary of the Treasury and of Congress. The appeal of Gordon was dismissed upon the ground that Congress could not "authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclu-



sive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said Chief Justice Taney, "is a part and an essential part, of every judgment, passed by a court exercising judicial power. It is no judgment, in the legal sense of term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this Act of Congress."<sup>1</sup>

In *Sanborn's case*, above cited, the same principles were announced. That case arose under an Act of Congress of March 3, 1887 (24 Stat. at L. 505, chap. 105) one section of which provided that "when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted. § 12. The court dismissed an appeal from a finding of the Court of Claims, under this Act. Referring to the cases of *Hayburn*, *Todd*, *Ferreira*, and *Gordon*, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and

<sup>1</sup> *Gordon v. United States*, 117 U. S. appx. p. 702. See *De Groot v. United States*, 72 U. S. 5 Wall. 419, 18 L. ed. 700.

indisputable basis of action either by the department or by Congress.”<sup>1</sup> The views expressed in the present case are declared not inconsistent with anything said or decided in those cases. They do not, in any manner, infringe upon the salutary doctrine that Congress (excluding the special cases provided for in the Constitution, as, for instance, in section two of article two of that instrument) may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the circuit courts of the United States by the 12th section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the Constitution, and considered in *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242, and in *Kilbourne v. Thompson*, 103 U. S. 168, 190, 26 L. ed. 377, 386, of the exercise by either house of Congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses, and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States, can only be exerted, under the law of the land, by a competent judicial tribunal having jurisdiction in the premises.<sup>2</sup>

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested—the validity of which is not questioned—of

<sup>1</sup> *Re Sanborn*, 148 U. S. 226, 37 L. ed. 431.

<sup>2</sup> See *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502, and authorities there cited.

compelling a witness to testify before the Interstate Commerce Commission, to answer questions propounded to him relating to the matter under investigation and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the Act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

The court disclaim any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. It could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the 12th section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's case*, one in which the United States seeks from the circuit court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed on appeal. And that judgment may be enforced by the process of the circuit court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's case*, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

This view is illustrated, it is said, in *Fong Yue Ting v. United States*, 149 U. S. 698, 728, 37 L. ed. 905, 918, which arose under the Act of May 5, 1892, chap. 60, prohibiting the coming of

Chinese persons into the United States. That Act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such persons shall establish, by affirmative proof, to the satisfaction of a justice, judge or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue, or United States marshal, and taken before a United States judge. The court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case—a complainant, defendant, and a judge—*actor, reus et iudex*.<sup>1</sup> No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute."

Another suggestion thrown out in argument against the validity of the 12th section of the Interstate Commerce Act, in the particular adverted to, was that the defendants are not accorded a right of trial by jury. If, the court say, as has been decided, this proceeding made a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case, the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the circuit court, is determined

<sup>1</sup> 3 Bl. Com. 25; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 738, 819, 6 L. ed. 204, 223.

adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands.<sup>1</sup> Surely it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.

The result follows that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of witnesses, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why witnesses should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the circuit court when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the circuit court, the form of judgment was considered. The case was heard below upon the petition of the Commission and the answers of the defendants. But no ruling

<sup>1</sup> Rev. Stat. § 725; 1 Stat. at L. 83; 4 Stat. at L. 487; *United States v. Hudson*, 11 U. S. 7 Cranch, 32, 3 L. ed. 259; *Anderson v. Dunn*, 19 U. S. 6 Wheat. 204, 227, 5 L. ed. 242, 247; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 510, 22 L. ed. 205, 207; *Ex parte Terry*, 128 U. S. 289, 302, 303, 32 L. ed. 405, 408; *Cartwright's Case*, 114 Mass. 230, 238.

was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the circuit court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, the court felt obliged to go no further at this time than to adjudge under the issue that that section in the particular named is constitutional, and to remand the cause that the court below might proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

As the question may be raised whether a corporation can be proceeded against by indictment, the Commission in the Fourth Annual Report to Congress, without discussing the point, refer to a number of judicial authorities upon the subject, showing that corporations are indictable, and the offenses for which they may be indicted. For this purpose the Commission avails itself of the treatise on corporations by Mr. Morawetz, in which the authorities below cited are collated: A corporation can not be charged criminally with a crime involving malice or the intention of the offender. But there are certain classes of crimes not depending on the intention of the offender, and in these cases the crime consists of the act alone, without regard to the intention with which it was committed, and there is no difficulty in attributing an offense of this character to a corporation, since it may be committed entirely through the company's agents.<sup>1</sup> Therefore a corporation may be indicted for causing a nuisance;<sup>2</sup> or for not

<sup>1</sup> Morawetz, *Priv. Corp.* § 732.

<sup>2</sup> *Com. v. New Bedford Bridge Proprs.* 2 Gray, 339; *State v. Morris & E. R. Co.* 23 N. J. L. 360; *Louisville & N. R. Co. v. State*, 3 Head, 523, 75 Am. Dec. 778; *Susquehanna & B. Turnp. R. Co. v. People*, 15 Wend. 267; *People v. Albany*, 11 Wend. 539, 27 Am. Dec. 95; *Reg. v. Great North of England R. Co.* 9 Q. B. 315; *Com. v. Vermont & M. R. Corp.* 4 Gray, 22.

performing a duty cast upon it by law ;<sup>1</sup> or for doing any act which is made indictable without regard to the intention of the offender.<sup>2</sup> On a motion for the issue of a distress warrant to compel an appearance of the defendant railroad company, which was considered as a motion to quash the indictment as to said company, it has been held that a corporation was not subject to an indictment under the Interstate Commerce Act.<sup>3</sup>

An indictment will lie against any officer, director, agent, or employe of a carrier who aids and abets a violation of the Interstate Commerce Law, as well as against the carrier, such officers and employes having knowledge that they are engaged in an illegal act.<sup>4</sup> If the agents or employes of a railroad, of whatever rank, make an unlawful contract, or if they knowingly aid and abet in the execution of an unlawful contract, they become liable to the penalties of the Act violated, but the proof, as in all criminal cases should be clear and leave no reasonable ground for doubt as to their guilty knowledge of the illegality of the Act.<sup>5</sup> When an agent of a railroad is prosecuted under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction ; it is sufficient to show that the accused was in fact an agent of a railroad subject to the Act, and that the wrong was committed under color of his office or agency.<sup>6</sup>

The Interstate Commerce Act was intended to punish only an active and willful violation of its provisions. Men who occupy merely clerical positions, who are only the instruments which carry out an unlawful action or contract made by their superior

<sup>1</sup> *Com. v. Central Bridge Corp.* 12 Cush. 242; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Louisville & N. R. Co. v. Com.* 13 Bush. 388; *Boston, C. & M. R. Co. v. State*, 32 N. H. 215; *Reg. v. Manchester*, 7 El. & Bl. 453.

<sup>2</sup> *Reg. v. Bradford Nav. Co.* 6 Best. & S. 631; *State v. Murfreesboro*, 11 Humph. 217; *United States v. Baltimore & O. R. Co.* 7 Am. L. Reg. N. S. 757; *Brennan v. Tracy*, 2 Mo. App. 540.

<sup>3</sup> *United States v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 287, 43 Fed. Rep. 26.

<sup>4</sup> *United States v. Cleveland, C. & S. R. Co.* 3 Inters. Com. Rep. 290.

<sup>5</sup> *United States v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 287, 43 Fed. Rep. 26.

<sup>6</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 422, 2 L. R. A. 444, 37 Fed. Rep. 635.



officers, which they do not concoct, should not be punished except where the proof of guilty knowledge and participation is clear.<sup>1</sup> An indictment, under the Interstate Commerce Act, § 2, for "unjust discrimination," need not aver by what particular device the defendant managed to discriminate in favor of a particular shipper. A count under the Interstate Commerce Act, § 9, is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. A count under the Interstate Commerce Act, § 3, charging the subjection of a certain locality to an undue prejudice by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rates. Counts under the Interstate Commerce Act, § 2, for "undue and unreasonable preference," and "for undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions,"—those words being found only in § 4, in relation to greater charge for shorter haul. A count under the Interstate Commerce Act, § 6, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section.<sup>2</sup>

A writ of habeas corpus will not issue in favor of one who is an officer of a railroad company, to wit: vice president and treasurer, and who is under arrest for contempt in refusing to answer questions put to him by or before the grand jury or to produce papers and documents of his company and under his control, ordered by subpoena *duces tecum* and by order on arrest for contempt, on the ground that such answers and production would tend to criminate himself and his company, the investigation being based upon no

<sup>1</sup> *United States v. Michigan Cent. R. Co.* 3 Inters. Com. Rep. 287, 43 Fed. Rep. 26.

<sup>2</sup> *United States v. Tozer*, 2 Inters. Com. Rep. 422, 2 L. R. A. 444, 37 Fed. Rep. 635.

charges against himself and his own testimony showing that they would not criminate him.

An indictment for violations of the Interstate Commerce Law in the transaction of a business which is subject to the provisions of that law only when it is carried on in a particular manner must show that the particular business with respect to which complaint is made is so carried on as to be within the provision of the law. An averment that an express company "was a corporation and a common carrier engaged in the transportation of property by railroad from one state of the United States to other states of the United States" tends to show simply that the company is an independent concern engaged in business for its own profit, and does not show that it is connected with any railroad company, hence it is insufficient to show that such company is within the purview of the Interstate Commerce Act; nor is it a sufficient description of a carrier declared by the Act to be subject to its provisions, as such carriers must be engaged in transportation of property "wholly by railroad."<sup>1</sup> And a mere freight agent who collects and receives rates fixed by other officers, having nothing to do with making the rate, is not liable to indictment under the interstate law for conspiring with the latter to charge a greater compensation for transportation of merchandise for a shorter than for a longer distance.<sup>2</sup>

A railroad company is not exempted from liability for establishing a tariff in violation of the provisions of the Interstate Commerce Law, by the fact that such tariff was established by a joint arrangement between it and other lines connecting with it.<sup>3</sup> The violation, by giving special rates or schedules of joint rates for through shipments from points in the United States to points in Canada, which have been established and filed with the Interstate Commerce Commission and posted in the carrier's offices, cannot be punished by the United States government so far as the violation was committed wholly or partly in Canada.<sup>4</sup>

<sup>1</sup> *United States v. Morsman*, 3 Inters. Com. Rep. 112, 42 Fed. Rep. 448.

<sup>2</sup> *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229.

<sup>3</sup> *Junod v. Chicago & N. W. R. Co.* 3 Inters. Com. Rep. 663, 47 Fed. Rep. 290.

<sup>4</sup> *United States v. Knight*, 3 Inters. Com. Rep. 801.

A railroad company which has published, filed, and posted, under the Interstate Commerce Act, a schedule of unlimited tickets between two points at a certain price, and limited tickets at a less price, does not violate the Act by selling tickets at such less price which are not limited as to the period of use, where the stop-over privileges thereunder are limited, and no explanation of the term "limited" has been required by the Interstate Commerce Commissioner or given by the company.<sup>1</sup>

The question whether a prosecution of the officers of the Union Pacific Railway Company for a violation of the Interstate Commerce Act is an effort on the part of the government to interfere with its revenues, which cannot be done until they exceed a certain percentage upon the costs of the road, cannot arise upon a motion to quash an indictment.<sup>2</sup>

<sup>1</sup> *United States v. Egan*, 3 Inters. Com. Rep. 582, 47 Fed. Rep. 112.

<sup>2</sup> *United States v. Mellen*, 4 Inters. Com. Rep. 247, 53 Fed. Rep. 229.



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